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THE
EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. I.

**TRINITY TERM, 10 VICT., TO HILARY TERM, 11 VICT.,
BOTH INCLUSIVE.**

BY

**W. N. WELSBY, OF THE MIDDLE TEMPLE,
E. T. HURLSTONE, } AND { J. GORDON,
OF THE INNER TEMPLE, } OF THE MIDDLE TEMPLE,
ESQUIRES, BARRISTERS-AT-LAW.**

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JUDGES
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

The Right Honourable Sir JAMES PARKE, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir ROBERT MONSEY ROLFE, Knt.
Sir THOMAS JOSHUA PLATT, Knt.

ATTORNEY-GENERAL.
Sir JOHN JERVIS, Knt.

SOLICITOR-GENERAL.
Sir DAVID DUNDAS, Knt.

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Exchequer Reports.

TRINITY TERM, 10 VICT.

BAYLEY and Another, Executors of T. K. BAYLEY,
v. BUCKLAND, GORDON, and Others.

1847.
May 22.

THIS was a rule calling upon the plaintiffs to shew cause why the judgment, execution, and all proceedings subsequent to the writ of summons, so far as respected the defendant Gordon, should not be set aside, and why the sum of 368*l.* 9*s.* 7*d.*, levied upon the said defendant Gordon's goods, and paid by him into Court, should not be repaid to him or his attorney. It appeared from the affidavits, that the defendants were shareholders in the Vale of Neath Brewery Company, and that the action was brought on a promissory note for 575*l.* 4*s.* 10*d.*, made by the company in favour of the plaintiffs' testator. The writ of summons issued on the 18th of November, 1846, and, on the 24th of the same month, the defendant Buckland, who was the managing director, wrote to the plaintiffs' attorney the following letter:—

“DEAR SIR,—I am sorry to find that process has been issued by Mr. Bayley's executors against the Vale of Neath

Where a defendant has been served with process, and an attorney without authority appears for him, the Court will not interfere to set aside the proceedings, if the attorney be solvent, but will leave the defendant to his remedy by summary application against the attorney. If the attorney be insolvent, the Court will relieve the defendant on equitable terms, if he has a defence on the merits.

But where a plaintiff, without serving a defendant, accepts the appearance of an unauthorised attorney for the defendant, the Court will set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs, and the expense to which he has been put, from the delinquent attorney by summary proceedings.

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Brewery Company. Mr. George Leeds, of Neath, is the solicitor of the company, and will accept service on behalf of all parties, and act for them. I hope you will not allow any unnecessary expenses to be incurred. I enclose a check for 25*l.* 19*s.* 6*d.*, amount of costs indorsed on the writ, and hope to settle the claim before any greater expenses are incurred. Please to acknowledge the receipt of the check, addressed to the company at Neath.

“ W. H. BUCKLAND.”

At the time the above letter was received, the defendant Gordon and several others had not been personally served with the writ; and, in consequence of the letter, no further attempts were made by the plaintiffs' attorney to effect service on them, but he immediately forwarded the writ to Mr. Leeds, who indorsed on it the usual undertaking, to appear on behalf of the defendants. An appearance was afterwards entered in pursuance of such undertaking, and the plaintiffs having declared on the note, a plea was delivered denying the making of the note, upon which issue was joined, and notice of trial given. On the 9th of January, the plaintiffs' attorney received a letter from Mr. Leeds, proposing that the plaintiffs should take the company's bills for the amount of the debt at two and four months, to be secured by a judge's order, with taxed costs to be paid down. This offer having been accepted, an order was drawn up by consent for payment of 345*l.* 6*s.* 4*d.*, and interest, by instalments, and in case of default the plaintiffs to be at liberty to sign final judgment, and issue execution for the whole amount remaining unpaid. Default having been made in payment of one instalment, judgment was entered up, and execution levied upon the goods of Gordon. An application was made to *Erle, J.*, at chambers, to set aside the judgment and execution, when he ordered that upon payment of the sum levied into Court, the matter should be adjourned until the fifth day of the ensuing term. The affidavit of Gordon

stated, that he was never served with any writ in this action, nor until the levy made had he ever knowledge of any such action having been brought, or of any writ having issued against him, or of any appearance having been entered for him: that he never appeared to the action, or authorised Mr. Leeds or any person or persons to appear for him in the said action, nor had he ever authorised Buckland or any other person to cause an appearance to be entered for him, nor had he any notice of any of the proceedings in this action, or any knowledge of the existence thereof, or of any circumstances giving rise thereto, or of any intention to bring the same action, until the said execution was levied: it also stated that he had a good defence upon the merits. It appeared that Leeds was in solvent circumstances, and a person of responsibility.

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Martin (*Skinner* with him) shewed cause.—The Court will not interfere to set aside this execution. The general rule is, that where an attorney has appeared without authority, the Court proceeds as if he had authority, and leaves the defendant to his remedy against the attorney. Such is the law laid down in an anonymous case in *Salkeld* (a), and since invariably acted on. There *Holt*, C. J., says, “The course of this Court is, where an attorney takes upon him to appear, the Court looks no further, but proceeds as if the attorney had authority, and leaves the party to his action against him.” In a subsequent anonymous case in the same book (b), the rule is laid down in similar terms, though somewhat qualified: there the Court say, “If the attorney be able and responsible, we will not set aside the judgment. The reason is, because the judgment is regular, and the plaintiff ought not to suffer, for there is no fault in him; but if the attorney be not responsible, or suspicious, we will set aside the judgment, for otherwise the defendant has no remedy, and any one may be

(a) 1 Salk. 86.

(b) Id. 88.

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undone by that means." The same law is found in an anonymous case in the Modern Reports (*a*), where it is said that "If an attorney appear for another without a warrant, and judgment is against him, the judgment shall stand, and the party shall be put to his action against the attorney; but if the attorney be a beggar, or in a suspicious condition, the Court will set aside the judgment." Those authorities were acted upon in a recent case of *Stanhope v. Forman* (*b*). In *Mudry v. Newman* (*c*), it was held to be no answer to a rule for judgment as in case of a nonsuit, that the action was brought by an attorney without the knowledge or authority of the plaintiff. *Williams v. Smith* (*d*), *Barber v. Wilkins* (*e*), and *Hubbart v. Phillips* (*f*), are to the same effect. *Hambridge v. De La Crouée* (*g*) is an analogous case: there it was held that one partner could not authorise an attorney to enter an appearance and submit to judgment for a copartner.

The *Attorney-General*, in support of the rule.—It is conceded that there is an apparent current of authority, but the Courts do not seem to have always acted upon the rule laid down with respect to the attorney's solvency. The case in *Salkeld* is very loosely reported, and for aught that appears may have turned upon the mere technical objection of an omission to produce a warrant of attorney, as formerly required. If a party is sued for a debt, and pays the amount to an attorney who has commenced proceedings without any authority, the party sued is liable to pay the money over again: *Robson v. Eaton* (*h*). Upon that ground the Court allowed the application in the case of *Hubbart v. Phillips*; and it is a strange doctrine to hold that the party's responsibility will depend upon the solvency or insolvency of

(*a*) 6 Mod. 16.

(*b*) 3 Bing. N. C. 303.

(*c*) 1 C., M. & R. 402.

(*d*) 1 Dowl. P. C. 632.

(*e*) 5 Dowl. P. C. 305.

(*f*) 13 M. & W. 702.

(*g*) C. P., Mich. T., 1846.

(*h*) 1 T. R. 62.

the attorney. The rule does not appear to be founded on any principle. If the point is to be decided by the question as to which of the two parties should suffer from the wrongful act of the attorney, it is certainly more reasonable that the plaintiff should, for he might have written to or served process on the defendant. The practice is not so inveterate as to preclude the Court from examining the propriety of the rule as laid down in Salkeld's Reports.

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Cur. adv. vult.

At the sittings after term (July 3), the judgment of the Court was delivered by

ROLFE, B.—We took time to consider this case, in order that we might determine what rule it might be proper to lay down as a guide to similar cases in future. There is no dispute as to the facts. The plaintiffs commenced their action against the several defendants, including Mr. George Gordon, the party now applying for relief; they served some of the defendants, not including the applicant Mr. Gordon, with the writ, and after this an attorney at Neath, Mr. George Leeds, was instructed by the parties served to appear, and did appear for all the defendants, except a person of the name of Clarke, for whom an appearance was duly entered according to the form of the statute by the plaintiffs. Mr. Leeds then, by like authority, consented to a judge's order to stay proceedings on payment of debt and costs. This order not having been complied with, judgment against all the defendants was signed, and execution sued out. Under this execution the goods of Mr. Gordon were seized by the sheriff, Mr. Gordon never having been served with the writ, and having given no authority, direct or indirect, to Mr. Leeds to appear for him. He now applies to have the judgment set aside, either as an irregular judg-

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ment, or, if a regular judgment, then on an affidavit of merits, and on payment of costs. The only other material fact mentioned in the affidavit is, that Mr. George Leeda, the attorney by whom the appearance has been entered, is in solvent circumstances.

The rule of law hitherto has generally been considered to be as stated in an anonymous case in Salkeld, 86, that "where an attorney takes upon himself to appear, the Court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him;" but they qualified it in Salkeld, 88, stating that the judgment was regular, "but that if the attorney be not responsible or suspicious, they would set aside the judgment, for otherwise the defendant has no remedy, and any one may be undone by that means." It must be admitted, that the reasoning is not very clear by which the Court arrived at the conclusion that, in so doing, they did justice to the defendant, for the non-responsibility or suspiciousness of the attorney is but a vague sort of criterion of safety to the defendant, and by the hypothesis the defendant is wholly without blame, and may notwithstanding be ruined. It is true that the plaintiff is equally blameless, but then the plaintiff, if the judgment be set aside, has his remedy against the defendant as before, and suffers only the delay and possible loss of costs.

We are disposed to lay down a different rule, and to confine the liability of the defendant to cases in which the course of the proceedings has given him notice of the action being brought against him. When, therefore, a defendant has been served with process, and an attorney without authority appears for him, we think the Court must proceed as if the attorney really had authority, because, in that case, the defendant, having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney, if he

has any defence on the merits. There the plaintiff is without blame, and the defendant is guilty of negligence. But even in that case, if the attorney be not solvent, we should relieve the defendant upon equitable terms, if he had a defence on the merits. If the attorney were solvent, it would not be unjust to leave the defendant to his remedy by summary application against him.

On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorised attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant there is wholly free from blame, and the plaintiff not so; and upon the same principle on which we before proceeded, we must set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs, and the expense to which he has been put, from the delinquent attorney, by summary proceedings. The case of *Hubbart v. Phillips* (a) is an authority for such an application. Now, applying those principles to the present case, it is clear that this judgment is irregular, and the rule must be made absolute for setting it aside.

Rule absolute.

(a) 13 M. & W. 702.

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1847.

May 22.

Where a judge at chambers, by an interpleader order, has directed money to be paid into Court to abide the event of an issue, and has reserved the question of costs, an application for payment of the money out of Court must be made to the same judge, and not to the Court.

MARKS *v.* RIDGWAY.COLLINS *v.* RIDGWAY.

THIS was a rule calling on S. Jackson to shew cause why the sum of £26, paid into Court in pursuance of an order of *Erle, J.*, made in the above causes, should not be paid out of Court to the plaintiff C. Marks, and why the costs of C. Marks of and occasioned by the said order, and the trial of the issue between S. Jackson, plaintiff, and C. Marks, defendant, should not be paid by S. Jackson to C. Marks.

It appeared that Marks and Collins, the two plaintiffs in the above actions, had respectively obtained judgment against Ridgway, and had levied execution on certain goods which were claimed by S. Jackson. An interpleader summons was thereupon taken out, and heard before *Erle, J.*, on the 23rd of September, 1846, when he ordered that the execution creditor, Collins, should be barred; that, upon payment of £26 into Court by the claimant and of possession money, the sheriff should withdraw from possession; that the parties should proceed to the trial of an issue, in which the claimant shall be plaintiff, and C. Marks defendant. The order concluded in the following terms:—"And I reserve the question of costs and all further questions until after the trial of the said issue." The issue was tried in February 1847, when the jury found a verdict for S. Jackson as to part of the goods, with £5 damages, and for the then defendant, C. Marks, as to the remaining portion of the goods. The present rule was thereupon obtained by C. Marks, against which

Pashley shewed cause.—The Court has no jurisdiction to entertain this motion; the application should be to the learned judge who made the order. The statute 1 & 2

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Vict. c. 45, s. 2, enables any judge of the superior courts to exercise such powers and authorities for the relief and protection of the sheriff or other officer, as may by virtue of the 1 & 2 Will. 4, c. 58, s. 6, be exercised by the several courts respectively, and to make such order thereon as shall appear to be just; and the statute expressly enacts, "that the costs of such proceeding *shall be in the discretion of such judge.*" The construction of those words was under consideration in the case of *Burgh v. Schofield (a)*. There Lord Abinger, C. B., says, "There is some perplexity in this matter, but upon the whole it appears to me that by this act of Parliament the discretion is vested in the judge." [*Alderson, B.*—The 1 & 2 Will. 4, c. 58, s. 1, enables either the Court or a judge to make an order for relief against adverse claims, and, in addition, "to make such other rules and orders therein as to costs, and all other matters, as may appear just and reasonable;" that means, that the Court or judge who made the original order shall also make the further order. The statute 1 & 2 Vict. c. 45, s. 2, enables any judge of the superior courts to exercise the powers given by the former act, but with all its reservations; therefore, if a judge make the original order, he must also make the further order.]

Pashley also argued, that the money could not be paid out of Court until after judgment was entered up, citing *Cooper v. The Lead Smelting Company (b)*, *Dickinson v. Eyre (c)*.

Miller, in support of the rule.—*Burgh v. Schofield* is distinguishable, because there the claim was abandoned, and no trial took place. In this case the issue has been tried, and the matter comes before the Court in the same way as any other cause. If an application had been made for a new trial on payment of costs, the Court would entertain the application. Their jurisdiction in that case would arise

(a) 9 M. & W. 478. (b) 9 Bing. 634. (c) 7 Q. B. 307, note.

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solely from the statute, and there is nothing to prevent its exercise in the present case.

POLLOCK, C. B.—If the point were now to be decided for the first time, I should decide in conformity with the case cited. But as the question is not new, the previous decision is binding; and as the application has been made notwithstanding that decision, the rule must be discharged with costs.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule discharged, with costs.

May 24.

ROCHE v. CHAMPAIN.

Debt for money had and received, money lent, and on an account stated, to the amount of 19*l.* 10*s.* Plea of set-off of 50*l.* The particulars of demand claimed 6*l.* 10*s.* for money lent; at the trial the defendant merely proved a set-off of 6*l.* 10*s.*—*Held*, that he was not entitled to the verdict.

DEBT. The declaration contained three counts, for money had and received, money lent, and on an account stated; and each count was for 6*l.* 10*s.*, making in the aggregate 19*l.* 10*s.* The only plea was a set-off of £50.

The plaintiff in his particulars of demand claimed 6*l.* 10*s.* for money lent. At the trial, before the under-sheriff of Middlesex, the defendant had a verdict, upon the proof of a set-off for 6*l.* 10*s.* *Bovill* had obtained a rule, calling on the defendant to shew cause why the verdict should not be entered for the plaintiff, or why there should not be a new trial.

Miller now shewed cause.—The defendant is entitled to retain the verdict which he has obtained. He has proved all that the plaintiff could have proved. [*Alderson*, B.—He has admitted the debt by not having pleaded to it; the

proper way would have been to have pleaded never indebted, in addition to the set-off.] The plaintiff has limited his claim by his particulars of demand, and therefore it is not necessary to plead to that which is admitted by the particulars not to be due; the matter stands precisely as if so much had been struck out of the declaration. There is no difference between the declarations in debt and assumpsit, and the defendant by his plea only admits that something is due, and not the whole amount of the sums laid in the declaration. [*Platt*, B.—In debt, you admit the whole amount.] The observations of Mr. Baron *Parke*, in the judgment of the Court delivered by him in the case of *Cousins v. Paddon* (a), shew that the declarations stand precisely on the same footing. He there says, “Whilst it was considered to be law that an action of debt on simple contract was founded on one entire single contract, and that the plaintiff could not recover less than the whole, doubtless a special plea of payment was also entire; and if the full amount was not proved to be paid, the plaintiff was entitled to a verdict; but since it has been established by several cases that the demand in such actions is divisible, and the plaintiff may recover less, and since several contracts may certainly be included in a demand of one sum in an action of debt on simple contract, as well as indebitatus assumpsit, and since a plea of payment, whether pleaded to a declaration in one form of action or the other, must have the same meaning, and does not of necessity import that one entire sum was paid at one time, we do not see any satisfactory reason why it may not be considered capable of being severed in one case as well as the other, whether pleaded to the whole declaration, or, as in the present case, to part.” [*Alderson*, B.—There is this difference between debt and assumpsit: in the former case a writ of inquiry is

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(a) 2 C., M. & R. 559.

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not necessary in order that execution may be issued, but it is in the latter, and this is found convenient. The question came distinctly before the Common Law Commissioners; and we determined to reject any innovation.]

Bovill, contra, cited *Rodgers v. Maw* (a).

PER CURIAM (b).—The rule must be absolute for a new trial.

Rule absolute.

(a) 15 M. & W. 444.

(b) *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

May 24.

GRANT v. MACKENZIE.

A notice of taxation of costs, dated the 23rd of February, to attend the following day, was left at the office of the plaintiff's attorney between seven and eight o'clock of the evening of the 24th:—*Held*, that the notice was sufficient.

BILLING had obtained a rule, calling on the defendant to shew cause why the taxation of costs should not be reviewed, on the ground (amongst others) that the notice given of taxation was not sufficient.

The notice was as follows:

"Take notice, I shall attend to tax costs *to-morrow* at 12.

Dated the 23rd of February."

This notice was put through the door of the office of the plaintiff's attorney between seven and eight o'clock in the evening of the 24th, there being no one at the office. The taxation was not attended on behalf of the plaintiff.

Humfrey now shewed cause, and contended that the notice given was sufficient.

Billing, in support of his rule.—The notice is not sufficient. A notice, to be good, should be such a one as can be understood by any person. In this case the notice was received by the attorney's clerk, after the time fixed by the notice for the taxation; when he saw the date he thought the time had passed, and was deceived by it. In *Benthall v. West* (a), where a notice of trial was dated and served on the first day of Hilary Term, 1844, for trial at the second sittings in *next* Hilary Term, it was held that it ought to be construed strictly as a notice of trial in the following year, and the cause having been tried in Hilary Term, 1844, and (the defendant not appearing) a verdict obtained by the plaintiff, the Court set it aside for want of due notice of trial. [*Alderson*, B.—In that case the notice was sensible. *Pollock*, C. B.—The attorney or his clerk should have been at the place till nine o'clock, ready to receive anything which might be delivered]. The notice is incorrect, and the fault is entirely with the other side. [*Rolfe*, B.—The delivery would cure the fault in the date.]

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POLLOCK, C. B.—Without laying down any general rule, I am of opinion that the notice, under the particular circumstances of this case, is sufficient. I think the attorney should have been at his place of business till nine o'clock, or should have left some person there to receive such matters; and I think that if he had been there, he could not have failed to see that it was a notice of taxation for the following day. The mistake was owing to the misapprehension of the clerk, which would not have arisen had proper inquiries been made. I am, therefore, of opinion that the rule should be discharged.

ALDERSON, B.—As the clerk was absent from the place

(a) 1 Dowl. & L. 599.

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where he should have been, I think that the defendant should not be placed in a worse situation than he would have been in had that person been there. If the clerk had been there, he would have received the notice, and the notice being dated the 23rd, and delivered the 24th, he could not have been deceived: he would have asked the person delivering it the meaning of it, and would not have been led to imagine that the time for taxation had elapsed. In the case put by Mr. *Billing*, the date is a future date, and the literal interpretation of the notice leads to nothing absurd. I am therefore of opinion that this rule should be discharged.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

May 25.

BILLING v. COPPOCK.

C., an attorney in London, employed B., also an attorney in London, to defend a person indicted at Cambridge for bribery at an election there. In the years 1841 and 1842, B. delivered to C. two bills of costs, and in the year 1847 he delivered copies of the bills duly signed:—*Held*, that the bills were taxable under the 6 & 7 Vict. c. 73, s. 37.

MARTIN moved for a rule, calling upon the defendant to shew cause why an order of *Alderson*, B., whereby the plaintiff's bills of costs were referred to the Master for taxation, should not be rescinded. The affidavit in support of the application stated, that, in the month of June 1841, the defendant, who was an attorney residing in London, requested the plaintiff, who was also a London attorney, to go to Cambridge, and defend one Hart, who was indicted for bribery at the Cambridge election. The defendant promised the plaintiff that he should be paid liberally for his services. The plaintiff accordingly undertook the defence. In the month of November 1841, the plaintiff sent to the defendant a bill of costs in respect of the business done up to the end of October, amounting to 128*l.* 12*s.*, and in the month of June 1842, the plaintiff sent in the residue of his charges,

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amounting to 174*L.* 6*s.* 8*d.* The defendant not having paid the whole amount, although he had often promised that he would settle the claim, the plaintiff, in the month of February last, with a view to legal proceedings, redelivered to the defendant copies of the bills of costs, duly signed; and, on the 16th of March, commenced the present action. After declaration, the defendant applied, by summons, to have the bills referred to the Master for taxation, which application the plaintiff opposed, on the ground that the bills were not taxable, according to the authority of *In re Simons* (a), and also because they had been delivered upwards of twelve months, and no special circumstances were proved to warrant such application. Alderson, B., overruled the objections, and made the order which it was now sought to rescind.—First, the power of the judge to refer the bills for taxation depends upon the 6 & 7 Vict. c. 73, s. 37; but it has been expressly decided that a bill for agency business is not taxable under that statute: *In re Gedge* (b), *In re Simons* (a). [Alderson, B.—How does it appear that Billing acted as the agent of Coppock? The charges seem to be made as between attorney and client, and not upon the usual scale of agency business.] It was the same in the case of *In re Simons*: there the defendant, who was solicitor to the Post-office, employed the plaintiff, who was a country attorney, to conduct a prosecution for forgery, instituted at the suit of the Postmaster-General. The bill, it appeared, did not charge the defendant as was usual in cases of agency business, and Coleridge, J., adverts to that fact in his judgment, and says, “Simons has, indeed, chosen to make the same charges on Peacock as Peacock could make on the Postmaster-General, thereby not sharing, but absorbing, the whole of the profits. This is unusual; but this cannot alter the character of his service. It may be only a reason why a jury might, upon a trial, disallow some

(a) 3 Dowl. & L. 156.

(b) 2 Dowl. & L. 915.

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portion of his demand." [Alderson, B.—I thought, in the present case, that, as an action had been brought, it would be more reasonable that the jury should find their verdict according to the Master's taxation. Rolfe, B.—Suppose Coppock had prosecuted a person for bribery, and had employed an attorney for that purpose, is he not to have the bill taxed, because he happens to be an attorney himself? Pollock, C. B.—The case of *Waymouth v. Knipe* (a) decided that an agent's bill was expressly excepted out of the 2 Geo. 2, c. 23, by the 12 Geo. 2, c. 13. Now, as it required a new statute to take agency bills out of the operation of the 2 Geo. 2, c. 23, and as such bills are not excepted out of the 6 & 7 Vict. c. 73, it is evident that the intention of the legislature was, that the 6 & 7 Vict. c. 73, should have the same effect as the 2 Geo. 2, c. 23, and include agency bills.]

Secondly, more than twelve months have elapsed since the original delivery of the bills, and no "special circumstances" are proved to warrant the judge in referring them for taxation, as required by the 6 & 7 Vict. c. 73, s. 37. The defendant cannot object that those bills were unsigned, for signature is required as a protection to the client, and the absence of it is no ground for disallowing the taxation: *In re Pender* (b). The defendant was bound to have proceeded with the taxation in the year 1842. [Pollock, C. B.—There is no foundation for that. The case *In re Pender* only decides, that if a client chooses to make use of an unsigned bill, the attorney shall not object to its taxation, merely because it is not signed. The 37th section of the 6 & 7 Vict. c. 73, first enacts, that no attorney shall recover his costs for business done until the expiration of one month after the delivery of a signed bill. Then follows the provision for referring the bill for taxation, after which is a proviso, that no such reference shall be directed "after the

(a) 3 Bing. N. C. 387.

(b) 2 Phillips, 69.

expiration of twelve months after *such* bill shall have been delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the Court or judge." That means a signed bill. [*Alderson*, B.—The subsequent delivery of a signed bill is a "special circumstance," upon which the party may act. The ordinary reading of the statute implies that he may tax within twelve months after the delivery of a signed bill. The Lord Chancellor has decided that the statute has a more extensive operation, and that the client may tax an unsigned bill. Here the judge's order is to tax the signed bill, and that had been delivered within twelve months. *Rolfe*, B.—If it were otherwise, an attorney might evade taxation altogether, by first delivering an unsigned bill, and then, after the expiration of twelve months, delivering a signed bill.]

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PER CURIAM,

Rule refused.

HOOPER and Another v. TREFFRY.

May 25.

ASSUMPSIT. The declaration contained counts for money lent, money paid, money had and received, &c.

Plea, non assumpsit.

At the trial, before the Lord Chief Baron, at the London sittings after last Michaelmas Term, the following facts appeared:—The plaintiffs carried on business in London as bark and leather factors. In June, 1845, the defendant, who resided in Cornwall, having some bark to dispose of, applied through one Moss, his London agent, to the plaintiffs to find him a purchaser. The plaintiffs applied to one

The defendant, having some bark to sell, applied to the plaintiffs to find a purchaser. The plaintiffs applied to T., who agreed to purchase the bark if equal to sample. The bark having been shipped, the defendant sent the plaintiffs the invoice, and requested

them to accept a bill of exchange for the price, which they did upon the offer of a *del credere* commission. The bark not being equal to sample, T. refused to accept it, and the plaintiffs having been called upon to pay the bill when due:—*Held*, that they were entitled to recover the amount of the bill, in an action for money paid to the defendant's use.

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Thompson, a dealer in bark in Edinburgh, but who was then in London, and they shewed him a sample of the bark produced by Moss. Thompson agreed to purchase the bark at £7 per ton, provided it was equal to the sample, and accordingly the plaintiffs drew up and forwarded to the defendant and Thompson bought and sold notes, which stated the bark to be equal to the sample. On the 9th of August, 1845, the defendant wrote to the plaintiffs, stating that the bark was shipped for Leith, and that his agent would hand them the invoice, and requesting them to accept a bill of exchange for the price of the bark. Soon afterwards Moss delivered to the plaintiffs the invoice of the bark, and produced a bill of exchange drawn by the defendant upon the plaintiffs for payment, to the order of Messrs. Bosanquet & Co., 379*l.* 1*s.* 10*d.*, fifty days after date. Moss having offered to pay the plaintiffs a del credere commission, they accepted the bill. On the 24th of August, Thompson wrote to the plaintiffs, stating that the bark was very inferior to the sample, and therefore he must reject it. The defendant, on being applied to, asserted that the bark shipped was equal to the sample, and he refused to take up the bill of exchange, or pay the charges for freight, &c. When the bill of exchange became due, it was paid by the plaintiffs, who brought the present action to recover the amount so paid. The learned Chief Baron directed the jury to consider whether the sale was by sample, and whether the bark corresponded with the sample. The jury found that the sale was by sample, and that the bark did not correspond with the sample; and they found a verdict for the plaintiffs, damages 379*l.* 1*s.* 10*d.*

A rule nisi having been obtained to enter a nonsuit, in pursuance of leave granted at the trial, on the ground that there was no privity between the plaintiffs and the defendant, or for a new trial on the ground of misdirection,

Gurney and *Badeley* shewed cause. — The plaintiffs are

entitled to recover from the defendant the amount of the bill, as money paid by them for his use. It will be said on the other side that the plaintiffs ought to have sued Thompson, but he is no more liable to pay the plaintiffs than he is to pay the defendant. The jury found that the sale was by sample, and that the bark did not correspond with the sample, so that Thompson was not bound by the contract, and the defendant has received the price of the bark without any consideration having passed from him. There is no want of privity between the plaintiffs and the defendant, as the former accepted the bill at the defendant's request; it was in fact a new transaction between them after the sale of the bark was complete, and the brokers were *functi officio*: *Blackburn v. Scholes (a)*. There was no privity between the plaintiffs and Thompson, as the latter did not request the plaintiffs to accept the bill, and at the time the bill became due Thompson had repudiated the contract.

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Crowder, in support of the rule.—The action is improperly brought against the defendant. There is no proof that the plaintiffs were the agents of the defendant. The plaintiffs contracted with Thompson for the sale to him of a certain quantity of bark at a given price. Thompson might have brought an action to recover special damage for the non-performance of that contract; but between the plaintiffs and the defendant there is no privity whatever; the plaintiffs were the agents of Thompson, and ought to have sued him.

POLLOCK, C. B.—The rule must be discharged. The bill was drawn by the defendant, and accepted by the plaintiffs at the defendant's request. The plaintiffs were liable in point of law to pay the bill when due; and, as between the plaintiffs and the defendant, the latter ought

(a) 2 Campb. 343.

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to pay the former the amount of the bill, because it was drawn and accepted on a consideration which failed. The rule was granted under a notion that there was a difficulty in shewing any privity between the plaintiffs and the defendant. But the fact of a bill being drawn by the defendant upon the plaintiffs is sufficient to create a privity between them, more especially when accepted by the plaintiffs at the request of the defendant. There is no evidence that the bill was drawn otherwise than as an accommodation bill, in the confident expectation that the contract would be performed by the defendant. When the bark arrives, Thompson repudiates the transaction altogether. The plaintiffs were called upon to pay the bill when due, and having done so, they are entitled to recover the amount from the defendant as money paid to his use, since he ought to have withdrawn it from circulation.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule discharged.



May 28.

VOLLANS v. FLETCHER.

A. applied by letter for shares in a railway company, and thereby undertook to accept the shares which might be allotted to him, to pay the deposit, and to sign the parliamentary contract and subscribers' agreement. In answer to this he received a letter, allotting to him a certain number of shares, and requiring him to pay the deposit thereon on a certain day, and stating that the committee reserved the power to cancel the allotment, without notice, on non-payment. In an action by A. to recover the deposit, the scheme having failed:—*Held*, that the letter of allotment did not require a stamp.

ASSUMPSIT for money had and received, and on an account stated.

Plea, non assumpsit.

This was an action brought by the plaintiff against the defendant, who was chairman of the board of directors of the Birmingham, West Bromwich, Wednesbury, and Walsall Junction Railway, to recover the deposit paid upon ten

shares allotted to the plaintiff in the company, which had been dissolved. At the trial, before *Pollock*, C. B., at the London Sittings after last Michaelmas Term, the plaintiff tendered in evidence the letter of allotment. The defendant produced the letter of application, and contended that they could not be given in evidence without a stamp, as they together formed the agreement under which the deposit had been paid. The Lord Chief Baron, inclining to that opinion, nonsuited the plaintiff, but reserved leave to move the Court to set aside the nonsuit, and to enter a verdict for the plaintiff for the amount of the deposit paid.

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The letter of application was as follows:—

“To the Provisional Committee of the Birmingham, West Bromwich, Wednesbury, and Walsall Junction Railway.

“Gentlemen,—I request that you will allot me twenty shares of £20 each in the above-named company; and I hereby undertake to accept the same or any less number you may allot me, and to pay the deposit of 2*l.* 2*s.* per share thereon, and to sign the parliamentary contract and subscribers’ agreement when required.”

(Signed by the plaintiff).

In answer to this letter of application the plaintiff received the following letter of allotment:—

“Not transferable.

“Birmingham, West Bromwich, Wednesbury, and Walsall Junction Railway.

“Provisionally Registered.

“Capital £200,000, in 10,000 shares of £20 each; deposit 2*l.* 2*s.* per share. Allotment No. 348. Ten shares, deposit £21.

“Birmingham, 29th October, 1845.

Sir,—We are directed to inform you that the committee of management have, in compliance with your application,

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allotted to you ten shares in this undertaking; and that the deposit of 2*l.* 2*s.* per share, amounting to £21, must be paid to one of the under-mentioned bankers on or before Thursday, the 6th day of November next, who, upon receipt thereof, will sign the voucher at the foot of the letter.

“In default of payment of the above-mentioned deposit by the day mentioned, the committee reserve the power of cancelling the allotment without notice. This letter, with the bankers’ receipt, must be exchanged for scrip certificates, which will be granted upon your executing the subscribers’ agreement and parliamentary contract, without which no person will be recognised as a subscriber, or be entitled to any interest in the undertaking.

“We are, Sir, your obedient servants,

“W. H. REECE, Solicitor.

“W. R. KETTLE, Sec. pro tem.

“To J. W. T. Vollans, Esq.”

Martin having obtained a rule nisi in Hilary Term,

Crowder and *Ball* now shewed cause.—The terms upon which the deposit was paid could not be shewn without the production of these documents. By the letter of application the plaintiff proposes to have the shares on particular terms; and the letter of allotment is an answer to this. These are the only evidence of the contract, and together form the agreement between the parties: they therefore come within the meaning of the schedule of 55 Geo. 3, c. 184, by which a stamp is required upon “an agreement, or any minute or memorandum of an agreement, made in England under hand only, or made in Scotland without any clause of registration (and not otherwise charged in this schedule, nor expressly exempted from all stamp duty), where the matter thereof shall be of the value of £20 or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written

instrument, together with every schedule, receipt, or other matter put or indorsed thereon or annexed thereto." Now the letter of allotment is either obligatory upon the parties, or else it is evidence of the contract. The words of the statute are intended to embrace such a case as the present. In *Robinson v. Drybrough* (a), where a question was raised upon the meaning of 23 Geo. 3, c. 58, by which statute a stamp duty was required "for every piece of paper, &c., upon which any agreement shall be written, whether the same shall be only evidence of the contract, or obligatory upon the parties from its being a written instrument," Lord *Ellenborough*, C. J., said, "The statute was thus particularly penned to obviate any objection which ingenuity might raise to creep out of it."

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Martin (with whom was *Hoggins*) contra.—The letters of application and allotment do not by themselves constitute any contract. The question is, whether the letter of allotment is a simple answer to the letter of application. Now the letter of allotment contains a new term, and till that is adopted by the applicant, the contract is not made. By the letter of allotment, the shares are offered to the plaintiff to be paid for in a particular way, power being reserved to cancel the allotment. The letter of application is, therefore, out of the question. [*Pollock*, C. B.—Your argument is, that the letter of allotment is the commencement of a new bargain, and the answer is a matter of fact.] Precisely so; until the deposit has been paid, there is not a complete contract. [*Alderson*, B.—It appears to me, that if the two letters only are taken, there is no agreement.] A written proposal acceded to by parol does not require a stamp. All the cases are to this effect. Thus, it was held, in *Penniford v. Hamilton* (b), in an action for work and labour, that a proposal on the part of the defendant, which was not finally ac-

(a) 6 T. R. 317.

(b) 2 Stark. N. P. 475.

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ceded to, containing an estimate of the amount of the work, although unstamped, might be read in evidence by the defendant, *Abbott*, C. J., being of opinion, that, as it was a mere proposal, it did not require a stamp. It has already been decided that these letters do not necessarily constitute a binding contract, in the cases of *Walstab v. Spottiswoode* (a) and *Wontner v. Shairp* (b), where the letter of allotment was not a simple acceptance of the proposal contained in the letter of application. And in *Edgar v. Black* (c), where the plaintiff had signified by a printed prospectus on what terms his services were to be engaged, it was held, in an action against the defendant, who had engaged him under a parol agreement, that the prospectus might be given in evidence unstamped to shew what the terms were. Lord *Ellenborough*, C. J., said, "This was a parol contract, adopting the term of a written proposition previously existing." That case is strictly in point. This letter of allotment, being a mere proposal, does not come within the meaning of the words of the statute—"whether the same shall be only evidence of a contract," &c. In *Vaughton v. Brine* (d), where this clause of the statute came under the review of the Court of Common Pleas, *Tindal*, C. J., said, "With respect to the words on which the present question arises, namely, 'whether the same shall be only evidence of a contract,' &c., it seems to me that the meaning of these words is, that the duty is not to be confined to cases where there is an agreement, but is to extend to all cases in which recourse is had to any writing as evidence of a contract. The document, however, must still come within the former words, 'minute or memorandum of agreement.' I am of opinion that the resolution in question is not either an agreement or a memorandum of an agreement. It does not appear that the plaintiff was pre-

(a) 15 M. & W. 501.

(b) C. B., E. T., 1847.

(c) 1 Stark. N. P. 464.

(d) 1 Man. & G. 359.

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sent when it was made, or that he was consulted with respect to it. It may have been either a proposal, or an authority to enter into a contract or a resolution that was afterwards carried into effect, and therefore only evidence of the terms of an agreement subsequently made." And *Maule, J.*, says, "The subsequent words, 'whether the same shall be only evidence of a contract, or obligatory on the parties from its being a written instrument,' are, I conceive, used to exclude the excuse that the agreement, of which some memorandum is given as evidence, need not have been made in writing, which would, in every case not within the Statute of Frauds, enable a party to give in evidence a written contract without its being stamped. It is quite clear that the resolution did not require a stamp. It is nothing more than a memorandum,—a mere determination formed by these defendants to employ the plaintiff, which they might have rescinded, and which would not bind the plaintiff, unless he consented to it afterwards."

Crowder.—The plaintiff could not have refused to receive the shares upon the terms proposed in the letter of allotment, as he had agreed to do so by the letter of application.

POLLOCK, C. B.—We are clearly of opinion that no stamp was requisite in this case. The rule must, therefore, be absolute to enter a verdict for the plaintiff.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule absolute.

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June 12.

An acknowledgment by a banker of the receipt of money paid as deposit by an allottee of shares in a joint-stock company, does not require a stamp.

Where an allottee of shares in a joint-stock company, which is afterwards abandoned, seeks to recover back the deposit paid as upon a failure of consideration, he must give in evidence the letter of allotment.

CLARKE v. CHAPLIN.

ASSUMPSIT for money had and received to the use of the plaintiff, and for money due on an account stated.

The defendant pleaded non assumpsit, with other pleas.

At the trial, before *Pollock*, C. B., at the London Sitings after Hilary Term last, it appeared that the action was brought to recover the sum of £100, being the amount of deposits paid by the plaintiff upon an allotment to him of shares in a joint-stock company, called the London and Westminster Water Company, of which the defendant was a director. The scheme having been subsequently abandoned, the present action was brought, on the authority of *Walstab v. Spottiswoode* (a), to recover back the deposits, as upon a failure of consideration. The defendant had applied for shares in the company, and had received a letter in reply, allotting him twenty shares. On the 8th of June, 1841, the plaintiff, in compliance with the directions contained in the letter of allotment, paid the sum of £100 into the bank of Jones, Loyd, & Co., by a cheque to which the letter of allotment was annexed, and took from them the following receipt:—

“The London and Westminster Water Company,

“London, February 8th, 1841.

“Received one hundred pounds, to be placed to the account of William Chaplin, Thomas Devear, James Patrick McDougal, Joseph Workman, and James Perry Clarke.

“For Messrs. Jones, Loyd, & Co. £100.

“A. PALMER.

“This receipt not transferable. The party to whom these shares are allotted is requested to attend immediately at the offices of the Company, No. 7, St. Martin's Lane,

(a) 15 M. & W. 501.

Trafalgar Square, with this receipt, to sign the parliamentary contract, when the receipt will be exchanged for the shares. Monday, the 8th of February, is the last day for such attendance."

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The above document, stamped with an agreement stamp, was tendered in evidence by the plaintiff, and objected to by the defendant on the ground that it ought to have been stamped with a receipt stamp. The learned judge overruled the objection, and the document was read. The plaintiff also gave in evidence a letter of the 8th of February, 1842, in which, after stating that he had not received the twenty shares in exchange for the £100 paid by him, he requested a return of his money. To this the following answer was returned by the secretary of the company:—

"7, St. Martin's Lane, February 17th, 1842.

"Sir,—Mr. Chaplin has handed to me a letter addressed to him by you relative to the Water Company. I beg to inform you, that every effort is being made to Parliament this session. I expect every day to have to write officially to you to request your signature to the parliamentary list. In the meantime, should you call or send here, you will be furnished with a new prospectus, and John Stephenson's second report. I am, Sir, yours, &c.

"G. W. BLANCHE, Hon. Secretary."

It appeared that the letter of allotment was in the possession of the defendant's attorney, but it was not produced, nor was secondary evidence given of its contents. On behalf of the defendant, it was objected that the plaintiff could not succeed without proof of the letter of allotment, as it contained the terms upon which the money was deposited. The learned judge was of opinion that the defendant's letter of the 17th of February amounted to an admission that the deposit was to be returned to the plaintiff, if the project was not proceeded with in the then session of

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Parliament; and the jury, under his Lordship's direction, returned a verdict for the plaintiff for the amount of the deposit, leave being reserved for the defendant to move to enter a nonsuit.

Sir *F. Thesiger*, in Easter Term last, obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered, or a new trial had. Against which

Martin and *Willes* shewed cause.—First, the document given by the bankers upon payment of the deposit did not require a receipt stamp. A receipt which requires a stamp is one that is given *in discharge* of a debt: this document was a mere acknowledgment of the deposit of a certain sum of money. The case resembles that of *Tomkins v. Ashby* (a), where the plaintiff, having deposited money in the hands of the defendant, received from him the following memorandum:—"Mr. Tomkins has left in my hands 200*l*;" and that was held to be admissible in evidence without a stamp. So, where a paper signed by the defendant was in the following form:—"Mr. Huxley has advanced me 12*l* on furniture, &c. delivered to him at Stratford," Lord *Abinger*, C. B., ruled that a stamp was not necessary, the document being merely an acknowledgment that money had been advanced on a pledge of furniture: *Huxley v. O'Connor* (b). Besides, the document in question comes within the exemption in the Stamp Act, 55 Geo. 3, c. 184, schedule, tit. "Receipt," which exempts from duty receipts given for money deposited in the Bank of England, or in the Bank of Scotland, or Royal Bank of Scotland, or in the Bank of the British Linen Company in Scotland, or in the hands of any banker or bankers to be accounted for on demand, provided the same be not expressed to be received of or by the hands of any other person than the person or

(a) 6 B. & C. 541.

(b) 8 Car. & P. 204.

persons to whom the same is to be accounted for. [*Pollock*, C. B.—The case clearly comes within that exemption.] They also cited *Flather v. Stubbs* (a).—Secondly, it was not necessary for the plaintiff to produce the letter of allotment. The ground on which the action proceeds is, that, the scheme having proved abortive, nothing whatever has been allotted to the plaintiff. *Walstab v. Spottiswoode* (b), *Nockells v. Crosby* (c).

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Gurney and *Ogle*, in support of the rule. —The receipt is not within the exemption of the Stamp Act, inasmuch as it was not given for money deposited with a banker “to be accounted for on demand.” The bankers were not bound to account to the plaintiff for the money, and conceding that they were bound to account to the defendant, he was not the person who paid in the money. To come within the exemption, it ought to appear on the face of the document that the money received was to be accounted for on demand. In *Catt v. Howard* (d), *Abbott*, C. J., ruled, that an accountable receipt for money given by the agent of one who receives money from different customers for the purpose of investing in annuities, &c. requires a stamp. [*Alderson*, B. —In that case there is a mistake in the marginal note: the receipt there given was not an accountable receipt.] At all events, this money was paid in discharge of a debt on demand. Where a person pays money upon a contract for the sale of a particular chattel to be delivered at a future day, a receipt for that money requires a stamp, though there is no antecedent debt. In like manner, this money was paid as part of the price of shares to be delivered at a future day.

Secondly, the money was deposited on certain terms contained in the letter of application for shares and the letter

(a) 2 G. & D. 290.
(b) 15 M. & W. 501.

(c) 3 B. & C. 814.
(d) 3 Stark. N. P. C. 3.

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of allotment, therefore the plaintiff, who relied on the abandonment of the contract, ought to have produced the letter of allotment, or if it were in the possession of the defendant, he should have given secondary evidence of its contents. If the letter of allotment were produced, it might appear from the terms of it that there had been no failure of consideration. [Platt, B.—It might be that the letter of allotment provided for the retention of the 100*l.* by the defendant for five years.]

POLLOCK, C. B.—We will take time to consider the question as to the production of the letter of allotment. With respect to the other point, I think a receipt stamp was unnecessary.

ALDERSON, B.—I also think that a receipt stamp was not necessary. The money was to be accounted for on demand, since the defendant might have drawn it out at any time he pleased.

ROLFE, B., and PLATT, B., concurred.

Rule discharged as to that point; as to the other,

Cur. adv. vult.

The judgment of the Court was delivered (July 3) by

ROLFE, B.—This was an action by an allottee of shares to recover back the money he had paid by way of deposit. At the trial, leave was given to the defendant to enter a nonsuit, in case the Court should be of opinion that there was not evidence to entitle the plaintiff to recover. The objection upon which we reserved our opinion was, that the plaintiff did not give in evidence the letter of allotment, which was a most material document in order to enable

him to recover back the deposit, as upon a consideration which had failed; because, unless the letter of allotment was produced, it was impossible to say whether the consideration had or had not failed. It was suggested that the defect was remedied by reason of a letter written by the plaintiff to the defendants on the 8th of February, 1841, and their reply thereto on the 17th of the same month. (His Lordship read the letters). The Lord Chief Baron thought that the defendants' answer might possibly be sufficient to entitle the plaintiff to recover, as being some evidence of an admission by the defendants that the terms of the contract were, that if they did not proceed with the act of Parliament in that session, the deposit was to be returned. The Court do not concur in that view of the case; they think the letter of allotment should undoubtedly have been produced, or if it could not be produced, secondary evidence should have been given of its contents, in order to see what the terms of the contract were, and how the plaintiff brings himself into a position to recover back this money. The Court have thought it the best course to modify the rule, and if the plaintiff thinks fit to pay the costs of the trial, then, instead of a nonsuit, he may have a new trial. The rule will therefore be absolute to enter a nonsuit, unless within ten days the plaintiff elects to pay the costs of the former trial, and then he may have a new trial on payment of those costs.

Rule accordingly.

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May 28.

BROMAGE and Another v. LLOYD and Another.

H. indorsed a promissory note, but did not deliver it. After the death of H. his executor delivered the note to the plaintiff:—
Held, that the plaintiff had no title to sue on the note.

ASSUMPSIT. The declaration stated, that the defendants, on &c. made their promissory note in writing, and thereby jointly and severally promised to pay one H. Lloyd Harries (since deceased) or order, £300 on demand, and then delivered the said note to the said H. Lloyd Harries, who then indorsed the said promissory note, but without making any delivery thereof; and afterwards, to wit, on &c., the said H. Lloyd Harries died, having first made his last will and testament, in writing, duly executed and attested as by law required, and thereby appointed his then wife, to wit, one Jane Harries, executrix thereof, who, after the death of the said H. Lloyd Harries, to wit, on &c., duly proved the said will and took upon herself the execution thereof, and became and was sole executrix thereof; and she, as such executrix, afterwards, to wit, on &c., for good and valid consideration to her, as such executrix as aforesaid, in that behalf, transferred the said note, so indorsed as aforesaid, to the plaintiffs, to wit, by delivery thereof to them by her as such executrix as aforesaid; of all which the defendants then had notice, and then, in consideration of the premises, promised to pay the amount of the same note to the plaintiffs, according to the tenor and effect thereof, and of the said indorsement and delivery. Breach, non-payment.

General demurrer, and joinder.

Phipson, in support of the demurrer.—The plaintiffs have no title to sue on the note. An indorsement consists of two things, namely, the writing on the note of the name of the party transferring it, and of a delivery for the purpose of completing such transfer: *Marston v. Allen* (a). In

the present case, the testator wrote his name on the note, but did not deliver it; the executrix has delivered the note without indorsing it. The indorsement by the testator was a mere inchoate act, which could not be rendered complete by the subsequent delivery of the executrix. [*Platt*, B.—In *Rex v. Lambton* (a), *Wood*, B., says, “It is clear that a special indorsement does not transfer the property in bills until they are delivered over.”] Suppose the testator had sealed a bond, and died without delivering it, a delivery by his executrix would not render it the deed of the testator. [*Alderson*, B.—In *Adams v. Jones* (b), Lord Denman, C.J., says, “A bill may be indorsed to a party in two ways, either by special indorsement, making it payable to that party, or by a blank indorsement, and delivery to that party. In the latter way, at all events, if not in the former, the bill must be delivered to the party *as indorsee*, in order to constitute an indorsement to him.”] An indorsement of a bill by an executor, with delivery, will not bind the assets of the testator: *Child v. Monins* (c). A fortiori delivery, without indorsement, cannot do so.

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The Court called on

Keating to support the declaration.—First, upon general demurrer, there is a sufficient allegation of the transfer of the note. The declaration alleges that the executrix, for good and valid consideration to her as executrix, transferred the note so indorsed to the plaintiffs, to wit, by delivery thereof to them by her, as such executrix as aforesaid. That allegation is tantamount to a legal indorsement by the executrix. [*Alderson*, B.—The promise alleged in the declaration is to pay according to the tenor and effect of the *said indorsement*.] If a legal transfer can only be made by

(a) 5 Price, 442.

(b) 12 Adol. & E. 459.

(c) 2 Brod. & Bing. 460.

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the party writing his name upon *and* delivering the note, then, upon general demurrer, such must be taken to be the meaning of the word "transferred." [*Alderson*, B.—The true construction of the declaration is this: that the executrix transferred the note "being so indorsed as aforesaid;" that is, indorsed by another person.] The *videlicet* does not control the operation of the word "transfer," or render material the mode in which it is alleged to have been made: *Hammond v. Colls* (a). A "transfer" may mean either an indorsement or assignment; which latter word is used in the statute 3 & 4 Anne, c. 9. If the defendant had pleaded by denying the transfer *modo et formâ*, and that issue had been found against him, he could not after verdict have taken advantage of any ambiguity in the declaration.

Secondly, even if it be taken on the face of the declaration that there was a mere writing of his name by the testator, and a delivery by the executrix, such transfer would pass the property in the note, and entitle the plaintiffs to sue upon it. Where a testator has delivered a note without indorsement, an indorsement by his executor is equally valid as if made by himself: *Watkins v. Maule* (b). [*Rolfe*, B.—That case only decides, that where a party delivers a note for a valuable consideration, without indorsement, he creates an equitable, not a legal, title, and the holder, having an equitable right, is entitled to call on the executor of the party who delivered it to give a formal transfer.] If a note is transferred without indorsement before bankruptcy, the holder may call on the bankrupt or his assignees to indorse it: *Smith v. Pickering* (c), *Arden v. Watkins* (d). There are many instances in which an executor may adopt and ratify the acts of his testator. A cognizance by a defendant, as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by

(a) 1 C. B. 916.

(b) 2 Jac. & W. 237.

(c) Peake, N. P. C. 50.

(d) 3 East, 317.

him in the name of the testator, and by his direction, but after his death; such distress, though made before probate, having been afterwards adopted and ratified by the executor: *Whitehead v. Taylor* (a). In that case Lord Denman, C. J., says, "The law knows no interval between the testator's death and the vesting of the right in his representative." An executor is not in the situation of a mere agent, but his acts are identified with those of his testator.

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Phipson, in reply, was stopped by the Court.

POLLOCK, C. B.—This is an action on a promissory note, upon which a party has written his name, and after his death his executrix delivers the note to the plaintiffs without indorsing it; so that there is a writing of his name by the deceased, and a delivery by his executrix. Those acts will not constitute an indorsement of the note: the person to whom it is so delivered has no right to sue upon it.

ALDERSON, B.—The promissory note was made payable to the testator "*or order*;" that means order in writing. The testator has written his name upon the note, but has given no order; the executrix has given an order, but not in writing. The two acts being bad, do not constitute one good act.

ROLFE, B.—The word "transfer" means indorsement and delivery.

PLATT, B., concurred.

Judgment for the defendant.

(a) 10 Adol. & E. 210.

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May 28.

DUKE, Knt., and Others, v. DRIVE.

A declaration stated that the plaintiffs agreed with other persons to endeavour to form a joint-stock company for making a railway, that a deposit of 2*l.* 2*s.* per share was to be paid by the allottees, that the plaintiffs formed the committee of management, and allotted to the defendant twenty-five shares, upon the terms that a deposit of 2*l.* 2*s.* per share should be paid by him on or before the 9th December, 1845, to the account of the company, to one of certain bankers, of all which premises the defendant, on &c., had notice. The declaration then averred mutual promises, and alleged that although the plaintiffs were always ready and willing to fulfil all things on their parts, and although the 9th day of December had elapsed, yet the defendant had not paid the deposit of 2*l.* 2*s.* per share.

The defendant pleaded, fourthly, that the plaintiffs were not always ready and willing to perform the terms in the declaration mentioned. Fifthly, that the defendant had not notice of the said several premises in the declaration mentioned. Sixthly, that before the commencement of the suit, the plaintiffs and the company agreed, without the consent of the defendant, that the endeavours to establish the company should be and the same were abandoned, and the shares allotted to the defendant became utterly worthless.

Held, on special demurrer, that the pleas were bad, and the declaration good.

ASSUMPSIT. The declaration stated, that the plaintiffs had agreed, together with divers, to wit, 200 persons, to endeavour to form a certain joint-stock company for the making of a certain railway, to be called the Dorking, Brighton, and Arundel Atmospheric Railway, and to endeavour to obtain an act of Parliament for that purpose, the capital whereof was to consist of £1,000,000, to be divided into 50,000 shares of £20 each, and upon which a deposit of 2*l.* 2*s.* for each share was to be paid by such persons to whom the said shares should be allotted by a committee of management: that before and at the time of the defendant's application for shares, and the making of his said promise as hereinafter mentioned, the plaintiffs formed the committee of management of the said proposed company: that the defendant applied to the plaintiffs, and requested them to allot him forty shares, and then undertook to accept the same, or any less number that might be allotted to him: that the plaintiffs allotted to him twenty-five shares, upon the terms that a deposit of 2*l.* 2*s.* upon each share should be paid by him on or before the 9th day of December, 1845, to the account of the said company, to one of certain bankers then appointed in that behalf, to wit, the London and County Joint-Stock Bank, &c.; of all which premises the defendant afterwards, to wit, on &c., had notice. The declaration then averred mutual promises, and alleged, that although the plaintiffs were always ready and willing to perform and fulfil the said terms in all things on

their parts, and although the said 9th day of December elapsed after the promise of the defendant, and before the commencement of this suit, of all which premises the defendant hath always had notice; yet the defendant hath not paid to any of the said bankers, or to any other person, to the account of the said company, the said deposit of 2*l.* 2*s.* per share, or any part thereof.

The defendant pleaded (amongst other pleas), fourthly, that the plaintiffs were not always ready and willing to perform the terms in the declaration mentioned, in all things on their parts to be performed, *modo et formâ*.

Fifthly, that the defendant had not notice of the said several promises in the declaration mentioned, *modo et formâ*.

Sixthly, that before the commencement of the suit the plaintiffs and the company agreed, without the consent of the defendant, that the endeavours to establish the company and obtain the act should be abandoned: that the same were abandoned, and are now, and were at the commencement of the suit, at an end, and the shares allotted to the defendant became utterly worthless.

Special demurrer to the fourth plea, assigning for causes, that there were no terms which the plaintiffs were bound to perform prior to the performance of the defendant's agreement: that the traverse was too large, as the plaintiffs were not bound to be always ready and willing to perform the said terms, nor in all things, or at all times, inasmuch as the time for the performance of some of those terms had not arrived when the cause of action accrued, and that it was not pointed out which of the terms the plaintiffs were not ready and willing to perform.

Special demurrer to the fifth plea, assigning for causes, that the traverse was too large, in making it incumbent on the plaintiffs to prove that the defendant had notice of all the premises in the declaration, and that it was uncertain what facts the defendant denied having notice of.

Special demurrer to the sixth plea, assigning for causes,

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that it did not traverse nor confess and avoid the cause of action, inasmuch as the plaintiffs' abandonment of their endeavours to form a company could not justify the defendant's breach of contract prior to the abandonment.

Joinders in demurrer.

Martin, in support of the demurrer.—The fourth plea is bad, inasmuch as the traverse is too large. The case is not distinguishable from *Tempest v. Kilner* (a), where, in assumpsit for the non-delivery of railway shares, the declaration contained an averment "that the plaintiff had always from the time of the making of the agreement been ready and willing to accept the transfer of the shares," and a plea traversing that allegation in terms was held bad on special demurrer. [*Alderson*, B.—The plea is clearly bad: the traverse is almost superfluous.] *Tempest v. Kilner* is also an authority to shew that the fifth plea is bad. The last plea is also bad. The defendant had committed a breach of contract by not paying the deposit on the 9th of December, and the subsequent abandonment of the undertaking by the plaintiffs affords no justification for the defendant's prior breach of contract.

G. T. White, contra.—The fourth plea is good. The case is distinguishable from *Tempest v. Kilner*, because there the allegation of time was divisible, and the traverse included immaterial matter. In that case *Tindal*, C. J., says, "The allegation in the declaration that the plaintiffs had always, from the time of the making of the agreement and promise, been ready and willing to accept the transfer, is to be taken with such reservation as the law imposes, viz. during such time as from the nature of the contract might be inferred to be reasonable." Here the plea only traverses the fact of the plaintiffs being ready and willing to fulfil

the terms of the agreement up to the 9th of December, until which period it was incumbent on the plaintiffs to keep an account open at the bankers, in order that the defendant might have an opportunity of paying his deposits.

With respect to the fifth plea, the traverse taken by it is not too large. It only compels the plaintiffs to prove that the defendant had notice of those facts which were a condition precedent to his liability to pay the deposit, namely, the agreement to form the company, and that a deposit of 2*l.* 2*s.* for each share was to be paid by the persons to whom shares should be allotted by a committee of management.

The sixth plea affords a good answer to the action. Upon the declaration as framed, the plaintiffs could only recover the deposit of 2*l.* 2*s.* per share, and after the scheme was abandoned, the defendant might recover back any deposits paid: *Walstab v. Spottiswoode* (a). The abandonment of the scheme operates retrospectively, and is a ground of defence, in order to prevent circuity of action. [*Alderson*, B.—This is not an action to recover the deposit, but to recover damages by reason of the non-payment of the deposits.] It is in substance an action to recover the deposits, and the defendant would be entitled to succeed, if he paid into court one shilling as a nominal damage. *Carr v. Stephens* (b) and *Simpson v. Swan* (c) are authorities to shew that a party cannot maintain an action in respect of a sum, which, if recovered, he would be liable to repay in a cross action. It would have been different if the declaration had alleged as special damage, that the plaintiffs were prevented from proceeding with the scheme in consequence of the defendant not paying the deposits. The case resembles that of a covenant not to sue, which has been held equivalent to a release, on the principle of avoiding

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(a) 15 M. & W. 501.

(b) 9 B. & C. 758.

(c) 3 Campb. 291.

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circuitry of action: *Walmsley v. Cooper (a)*, *Turner v. Davies (b)*, *Johnson v. Carre (c)*.

At all events, the declaration is bad: it merely states an agreement to endeavour to form a company, but it does not allege that the company was ever formed, nor is there even an averment of an endeavour to form it. There is a total absence of consideration for the promise, inasmuch as it is not shewn that the committee of management had any right to allot shares. Besides, the plaintiffs are only part of a larger body, and have no separate interest from the rest of the company, so as to entitle them to sue alone. The defendant's promise was to pay the whole body of the company, not the committee of management only: *Sims v. Bond (d)*.

Martin was not called on to reply.

POLLOCK, C. B.—The declaration is good on general demurrer. The pleas are bad, for the reasons assigned in the course of the argument.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiffs.

(a) 11 Adol. & E. 216.

(c) 1 Lev. 152.

(b) 2 Saund. 149, 150, n. 2.

(d) 5 B. & Adol. 389.

1847.

HAMMOND v. PEACOCK.

June 1.

THIS was an action to recover the sum of 10*l.* 16*s.*, as money received by the defendant for the use of the plaintiff. The defendant pleaded non assumpsit, upon which issue was joined. By a judge's order made by consent, the facts were stated for the opinion of the Court in the following case:—

The borough of Ipswich, in the county of Suffolk, is one of the boroughs named in the schedule (A.) to the act passed in the year, 1835, for the regulation of Municipal Corporations in England and Wales.

The said borough of Ipswich had a corporation by prescription, regulated by several charters, but was principally governed by a charter of King Edward IV., confirmed by charter of 17 Charles II. By the charter of 3 Edward IV., the town was incorporated by the name of "The Bailiffs, Burgesses, and Commonalty of the town of Ipswich," and the corporation consisted of two bailiffs, a recorder, twelve portreeves, and twenty-four common-councilmen, and an indefinite number of free burgesses. The two bailiffs annually chosen, and four of the twelve portreeves annually

By 14 Geo. 3, c. 59, s. 1, justices in quarter sessions assembled were authorized and required to appoint a surgeon, at a stated salary, to attend prisoners in gaol. The 4 Geo. 4, c. 64, (which repealed the 14 Geo. 3, c. 59, so far as related to the gaols of certain enumerated cities, not including "Ipswich,") by sec. 33, enacted that justices in general or quarter sessions assembled should from time to time appoint a surgeon to prisons within their jurisdiction, and it should be lawful for

them, after such appointment, to direct a reasonable sum to be paid as salary to each surgeon. The 5 & 6 Will. 4, c. 76, s. 116, enacts that the town council of boroughs enumerated in the 4 Geo. 4, c. 64, shall thenceforth have all the powers which justices in sessions possessed under that act; and sect. 105 enacts "that the recorder of every borough shall hold quarter sessions of the peace, at which he shall be the sole judge." The 7 Will. 4 & 1 Vict. c. 78, s. 38, enacts "that all powers of regulation which before the passing of the 5 & 6 Will. 4, c. 76, were possessed by the justices, and all things by any act of Parliament provided to be done at any quarter sessions, in relation to the regulation of any gaol, should be exercised by the borough justices, who should for that purpose hold a quarter sessions, provided that no order of the justices which should require the expenditure or payment of money should be of force until confirmed by the council. The 2 & 3 Vict. c. 56, extended the provisions of the 4 Geo. 4, c. 64, to all gaols.

Held, that the effect of the 7 Will. 4 & 1 Vict. c. 78, was to restore to the borough justices the power which they possessed before the 5 & 6 Will. 4, c. 76, of appointing a surgeon, and that the 2 & 3 Vict. c. 56, put all borough gaols, with reference to the 4 Geo. 4, c. 64, on the same footing with the gaols of the boroughs there enumerated, as if that statute had extended to all boroughs; and therefore that the right of appointing a surgeon for Ipswich gaol was properly exercised by the borough justices.

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selected by the bailiffs, upon or immediately after the election of the latter, were justices of the peace for the said borough within the said town, and as such held sessions of the peace half yearly for the trial of felonies, &c. until the year 1833, when they first began to hold sessions quarterly. There was a gaol in the said borough, of which the bailiffs were the keepers. In the year 1806, the justices in sessions appointed a gaoler, chaplain, and surgeon to the said gaol, and from that time the prisoners were committed thereto for trial for felonies and misdemeanors, &c.

In pursuance of the 98th section of the said act for the regulation of Municipal Corporations in England and Wales, a commission of the peace was, A. D. 1836, duly assigned for the said borough, by which parties were assigned to act as justices of the peace for the borough, and such persons have since acted, and now act as justices thereof. And the council of the said borough, having signified by petition to his late Majesty King William IV., in council, in accordance with the 103rd section of that act, that they were desirous that a separate court of quarter sessions of the peace should be continued to be holden in and for such borough, his Majesty thereupon, at Westminster, the 4th day of March, in the 6th year of his reign, granted that a separate court of quarter sessions of the peace should be thenceforth holden in and for the said borough, and a recorder was also then duly appointed, and the said court of quarter sessions has always since been duly held by the said recorder.

Previous to the year 1806, no surgeon or other medical officer was ever appointed for attending the prisoners confined in the borough gaol of Ipswich.

In the year 1806, the recorder and justices of the said borough, assembled in quarter sessions, by their certain order ordered the payment to Mr. Henry Seekamp, an apothecary, of 10*l.* 10*s.*, as a year's salary for attending the prisoners in the said gaol, out of the rate in the nature

of a county rate levied within the borough under the provisions of the act passed 13 Geo. 2, for (amongst other things) "extending the powers and authorities of justices of the peace of counties, touching county rates, to the justices of the peace of such liberties and franchises as have commissions of the peace within themselves;" and similar orders were made each succeeding year for the payment to Mr. Seekamp of the like sum, until the year 1815, when the amount was increased to £50 per annum, which latter sum was paid to Mr. Seekamp regularly each year to the time of his death, and he regularly attended the prisoners in the gaol, and provided all necessary medicine.

Mr. Seekamp died in 1819, and on the 23rd October in that year, the recorder and justices of the borough in quarter sessions appointed the plaintiff (who was and still is duly qualified according to law) to be surgeon to the gaol, and from the time of his appointment down to the time of passing of the said act for the regulation of municipal corporations, the plaintiff regularly received each year out of the said rate for the said borough, levied under the said act passed in the 13 Geo. 2, the salary of £50 for medicine, and for attendance on the prisoners confined in the said gaol.

After the passing of the said act for the regulation of municipal corporations, the office of treasurer of the said rate in the nature of a county rate was abolished, and the said plaintiff continued to hold his said office of surgeon, and down to and including the year 1844, the plaintiff has received each year from the treasurer of the borough fund of the said borough, by order of the said council of the said borough, the said sum; and he has, from the time of his first appointment in the year 1819, down to the 9th November, 1844, performed all the duties of surgeon to the said gaol.

The gaol of Ipswich is not exclusively used for the confinement of debtors.

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At a meeting of the council of the borough, held on the 9th November, 1844, a resolution was passed by the council for the removal of the plaintiff from the office of surgeon, and such removal was acquiesced in by the plaintiff, who claimed compensation for the loss of his office, and which claim was rejected by the council, and at the same time Mr. Webster Adams was appointed to that office by the council at a salary of £30 per annum, and continued to act in and perform the duties of the said office without any objection on the part of the recorder or justices of the said borough, until the month of January 1845, when he resigned the said office.

At a quarterly meeting of the council, held on the 29th of January, 1845, the council appointed Mr. W. Saunderson to the same office, in the room of the said Webster Adams, and he continued to act in and perform the duties of the said office (without any objection on the part of the said recorder or justices) until the 23rd or 24th day of June, when he died. At a subsequent quarterly meeting of the council of the borough, held on the 30th of July, 1845, the defendant was appointed to the office of surgeon to the gaol by the council of the borough, in the room of the said W. Saunderson, deceased, and he has from that time to the present performed the duties of surgeon to the gaol. The said W. Adams, W. Saunderson, and the defendant have from time to time been respectively paid a salary, as such surgeons, at the rate of £30 per annum, by orders of the council, directing the treasurer for the time being of the borough to pay certain sums in such orders mentioned, to each of them specifically by name. There are no funds whatever specially applicable to the payment of the surgeon to the gaol, nor are there any fees or emoluments attached to the office, or payable of right to such surgeon; and the only fund out of which the same can be paid is the borough fund of the said borough.

The justices of the borough, at a quarterly gaol session,

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held by them for that purpose on the 25th of July, 1845, (being the usual time for holding quarter sessions of the peace for the borough), appointed the plaintiff to the office of surgeon to the gaol, at a salary of £30 per annum to commence from that day, and he has from that time to the present performed the duties of surgeon to the gaol; and at a general quarter sessions of the peace for the borough, held on the 16th day of October, 1845, the recorder of the borough also appointed the plaintiff to such office, at the same salary.

It is admitted also, for the purpose of raising the question in this case, and for no other purpose, that on the 10th of November, 1845, and before the commencement of this action, the treasurer of the said borough of Ipswich received the sum of 10*l.* 16*s.*, to be paid over by him, and which he agreed to pay over, to the surgeon of the said gaol. The plaintiff and defendant respectively gave him notice of their said appointments, and each of them requested him to pay the said sum to him. The treasurer, afterwards and before the commencement of this action, paid the said sum of 10*l.* 16*s.* to the defendant, and the defendant received the same before the commencement of this action, with full notice of the plaintiff's claim to be surgeon, and of his having claimed the said sum of money as such surgeon; and it is admitted, for the purposes of this case only, that the plaintiff is entitled to recover the said money, as money received to his use by the defendant, if he was duly appointed, and was the surgeon of the said gaol entitled to hold the said office at the time of the said payment to the defendant.

The question for the opinion of the Court is, whether the plaintiff was, under the circumstances, duly appointed surgeon, and entitled to hold the said office at the time when the said sum of 10*l.* 16*s.* was so received by the said defendant as aforesaid.

If this Court shall be of opinion that he was then duly appointed and entitled to hold the said office of surgeon,

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judgment is to be entered for the plaintiff by confession, otherwise a nolle prosequi is to be entered.

Crompton argued for the plaintiff in last Easter Term (*April* 28 and *May* 3).—The appointment of the defendant by the council was illusory, the right of appointment being either in the justices or the recorder. The 4 Geo. 4, c. 64, s. 33, enacts, “that the justices in general or quarter sessions assembled shall, and they are hereby required, from time to time, to appoint a surgeon, being a member of one of the Royal Colleges of Surgeons, to each of the prisons within their jurisdiction, to which this act shall extend;” and it further enacts, “that it shall and may be lawful for the justices at every general or quarter sessions, after such appointment, to direct a reasonable sum to be paid as a salary to such surgeon, and also such sums of money as shall be due for medicines.” That statute, however, only repeals the 14 Geo. 3, c. 49, so far as relates to county gaols, and the gaols of certain enumerated cities and boroughs, not including Ipswich. The Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 116, after reciting that, by the 4 Geo. 4, c. 64, it was provided that certain cities, towns and places, in a certain schedule (A.) to that act annexed, should be taken to be within the provisions of the same, and also reciting that, by the 5 Geo. 4, c. 85, so much of the 4 Geo. 4, c. 64, as related to the cities of Canterbury, Lichfield, and Lincoln, was repealed, enacts “that the council of every borough named in the last-mentioned schedule (A.), except the cities of Canterbury, Lichfield, and Lincoln, shall have within their borough all the powers (except in hearing and determining appeals against convictions) which any justices of the peace, assembled at their general or quarter sessions in any county in England, have within the limits of their commission, by virtue of the said last recited acts, or either of them, or as near thereto as the nature of the case will admit; and all things in the said

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last recited acts, or either of them, provided to be done at any general or quarter sessions of the peace, shall be done at some quarterly meeting of the council of such borough. The 2 & 3 Vict. c. 56, s. 1, enacts, that the 4 Geo. 4, c. 64, and 5 Geo. 4, c. 84, except as to the classification of prisoners, shall, subject to the 5 & 6 Will. 4, c. 38, and 6 & 7 Will. 4, c. 105, and the 2 & 3 Vict. c. 56, extend to every gaol, house of correction, &c., in England and Wales. The effect of that enactment is to render the provisions of the 4 Geo. 4, c. 64, applicable to Ipswich, and that statute must now be read as if Ipswich had been originally included in it, so that the power to appoint a surgeon becomes vested in the justices under the 33rd section of that act. The Municipal Corporation Act gave particular powers to the town council; but the 2 & 3 Vict. c. 56, does not refer to the Municipal Corporation Act, nor are the enactments of the 2 & 3 Vict. c. 56, subject to the provisions of that act. It cannot, therefore, have an anticipatory effect, so as to control the provisions of a statute passed at a subsequent period; but the 116th section must be read as if it enumerated all cities and boroughs, except those not included in the 4 Geo. 4, c. 64. In *Regina v. The Bishop of Bath and Wells* (a), a question arose upon the 2 & 3 Vict. c. 56, as to the appointment of a chaplain to a gaol, and it was held that the power of appointment was in the town council, and not in the justices, because the bailiffs were "keepers" of the gaol within the meaning of the 15th section. The statute 7 Will. 4 & 1 Vict. c. 78, is relied upon by the other side. That statute confers on town councils particular powers, as to building, enlarging, and repairing gaols; and the 38th section enacts, "that all the powers of regulation which, before the passing of the 5 & 6 Will. 4, c. 76, were possessed by the justices having the government or ordering of any such gaol or

(a) 5 Q. B. 147.

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house of correction, and all things by any act of Parliament provided to be done at any general or quarter sessions of the peace, in relation to the regulating of any such gaol or house of correction, shall, subject to any such alteration as aforesaid, be exercised or done by the justices of the city or borough to which such gaol or house of correction shall belong; and for that purpose the justices shall hold a quarterly session at the usual times of holding quarterly sessions of the peace, provided that no order made by the justices in pursuance of these powers, which shall require the expenditure or payment of any money, shall be of force until confirmed by the council of that city or borough." The direction by the justices of a reasonable sum to be paid as salary to the surgeon, is not an order for the payment of money within the meaning of that section, but only an order made in pursuance of a particular power given by statute. At all events, the right to appoint a surgeon, if not in the justices, is in the recorder; *Regina v. The Recorder of Hull*(a); and in that case the plaintiff would be entitled to recover.

O'Malley, for the defendant.—The power of appointment is either in the town council, or subject to the confirmation of the town council. If the operation of these statutes be as contended for on the other side, it is not in the justices, but in the recorder. By the 38th section of the Municipal Corporation Act, the then existing officers of the corporation were superseded. The 98th section enabled his Majesty from time to time "to assign to so many persons as he should think proper, his Majesty's commission to act as justices of the peace in and for each borough," &c. The 101st section contains a proviso "that no such person by virtue of such assignment shall act as a justice of the peace at any court of gaol delivery, or any

(a) 8 Adol. & E. 639.

general or quarter sessions." The 105th section makes the recorder sole judge of the borough quarter sessions. The effect of these enactments is to vest in the recorder all the powers which the justices possessed under the 4 Geo. 4, c. 64. But on the passing of the 2 & 3 Vict. c. 56, the legislature intended to transfer those powers to the town council, and by that means to give effect to the 116th section of the Municipal Corporation Act. These several statutes must thus be read together:—the 4 Geo. 4, c. 64, contains certain provisions which extend to particular boroughs; the 5 & 6 Will. 4, c. 76, does not repeal those provisions, but only transfers the power of executing them to a different body; then follows the 2 & 3 Vict. c. 56, which extends to every borough such part of those provisions as relate to prisons, so that these latter provisions must now be exercised in every borough by the persons to whom the jurisdiction was transferred by the 5 & 6 Will. 4, c. 76. The main ground of the decision in *Regina v. The Bishop of Bath and Wells* (a) was that the 2 & 3 Vict. c. 56, was framed with a view to the existing state of things in every borough.

But neither the recorder nor the justices are capable of executing this power. First, as to the justices. The Municipal Corporation Act mentions two classes of boroughs in schedules (A.) and (B.). The former comprises boroughs which are to have a commission of the peace; the latter, boroughs which are not to have a commission of the peace, unless on petition and grant. The act, therefore, contemplates the case of a gaol existing where there may be neither recorder nor justices; consequently, the town council are the only persons who could execute the provisions with respect to gaols. If the legislature had intended that the justices should now exercise this power of appointment, the language of the 2 & 3 Vict. c. 56, would have been similar to that of

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the 6 Geo. 4, c. 64, s. 33; but the 2 & 3 Vict. c. 56, s. 2, in providing for the classification of prisoners, uses the words "persons authorised by law" to make rules and regulations for the government of prisons. The 15th section of the 2 & 3 Vict. c. 56, provides, "that in every borough gaol and house of correction, a chaplain shall be appointed by the same authority by which the keeper is appointed;" if, therefore, the justices have the right of appointment in this case, they would also be the persons to appoint the chaplain, which is contrary to the construction put upon the act in the case of *Regina v. The Bishop of Bath and Wells*. The 16th section also uses the words, "that it shall be lawful for the *justices or other person* having the appointment of the chaplain &c." The 10th section requires an annual return to be made to the Secretary of State, in the form given by the schedule, which in certain boroughs could only be done by the council. The consequence of holding this power to be vested in the justices, would be to repeal the 116th section of the Municipal Corporation Act, and 37th and 38th sections of the 7 Will. 4 & 1 Vict. c. 78.

Secondly, the recorder cannot exercise this power of appointment. Under the 4 Geo. 4, c. 64, many acts are required to be done by justices in quarter sessions assembled, which cannot be performed by the recorder. The 12th section enacts, "that it shall be lawful for *five* justices of the peace, in general or quarter sessions assembled, of each county, riding, or division of a county, or of any district, city, town, or place, to which that act shall extend, so far as respects the prisons within their respective jurisdictions, to make such further and additional rules, for the government of such prisons respectively, and for the duties to be performed by the officers of the same, as to them may seem expedient." The 50th section, which relates to the removal of the site of prisons, enacts, "that if it shall be resolved by the justices assembled at two successive general or quarter sessions, or the *major part of them*, that such

prison ought to be removed, or that such new prison is necessary, it shall be lawful for the justices so assembled to contract for the building of a new gaol" &c. The 54th section, which enables justices to mortgage the county rate when the estimate for building any gaol exceeds half the amount of the rate, enacts, "that it shall and may be lawful for the justices so assembled, and they are hereby authorised, to treat and agree with any person for the loan of any such sums of money, and by their order to confirm every such agreement, and every such agreement, *signed by the chairman, or two or more other justices*, present at the time of making such order, shall be and the same is hereby declared to be effectual for securing to the person so advancing any such sum of money, every such sum, with interest," &c. Also, under the Municipal Corporation Act, certain powers are conferred on justices which cannot be exercised by a recorder. By the 38th section, the regulation of gaols must be done by justices in quarter sessions assembled. It is clear that the recorder can have no power to raise money, for, by the Municipal Corporation Act, the taxation of boroughs is for the future to vest in the town council, (sect. 92). But the 4 Geo. 4, c. 64, s. 68, enables justices in sessions assembled to raise money, for the purpose of defraying the expenses of gaols, &c.; so that if the construction contended for on the other side be put upon that act, it would invest the justices or recorder with the power either of raising money by making rates, or of applying for a mandamus to compel the town council to do so. A similar power would arise under the 54th and 46th sections. Such power would be in contravention of the 101st section of the Municipal Corporation Act, which provides, that no person assigned to keep the peace within any borough shall act in the making or levying any county rate, or rate in the nature of a county rate. By the 59th section of that act, the treasurer alone is to pay money. It is conceded that there is difficulty in either construction of these enactments,

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which appear to have been framed without due consideration of the existing law. Under the 7 Will. 4 & 1 Vict. c. 78, s. 37, the council possess all the powers with respect to gaols which justices in sessions had under the 4 Geo. 4, c. 64. The 38th section of the same statute enacts, "that all the powers of regulation which, before the passing of the said act for regulating corporations, were possessed by the justices having the government or ordering of any such gaol or house of correction, and all things by any act of Parliament provided to be done at any general or quarter sessions of the peace, in relation to the regulating of any such gaol or house of correction, shall, subject to any such alteration as aforesaid, be exercised or done by the justices of the city or borough to which such gaol or house of correction shall belong." The word "provided" in that clause has not a prospective effect; but even if it had, the Court, in the case of *Regina v. The Bishop of Bath and Wells*, thought that no inconvenience was likely to arise from the appointment of chaplain being with the town council, while the regulation and control of the prison still remained with the justices. It would be a strong construction to say, that the power of *regulation* meant the power of appointing officers: it means simply the powers possessed by the justices under the 10th section of the 6 Geo. 4, c. 64. But supposing the power of appointment vests in the justices, their order is of no force unless confirmed by the council: 7 Will. 4 & 1 Vict. c. 78, s. 38. The appointment of the surgeon, and the assignment of his salary, are one entire act.

Crompton replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a special case argued in last term, and the question submitted for our decision was, whe-

ther, under the circumstances stated in the case, the plaintiff was duly appointed surgeon of the borough gaol at Ipswich, and entitled to hold that office on the 10th day of November, 1845. If he was, then, by the agreement of the parties, the plaintiff is to have judgment for a sum of 10*l.* 16*s.*, otherwise a *nolle prosequi* is to be entered.

In order to enable us to decide the case, we must endeavour to reconcile, so far as is possible, the enactments of several modern acts of Parliament, framed apparently without due regard to their bearing on one another.

The material facts are very simple. On the 25th of July, 1845, being the usual time of holding quarter sessions of the peace at Ipswich, the borough justices held a quarterly gaol session, and then and there appointed the plaintiff to the office of surgeon to the borough gaol, at a salary of £30 per annum, and he has ever since performed the duties of that office. At the general quarter sessions of the peace for the borough holden on the 15th of October following, the recorder appointed the plaintiff to the same office, at the same salary; so that if the appointment rests with the justices, or with the recorder, the plaintiff was well appointed, and was entitled to hold the office on the 10th of November, and so will be entitled to a verdict.

The first statute which we need notice, relating to the appointment of surgeons to gaols, is the 14 Geo. 3, c. 59. By the first section of that statute, the justices in quarter sessions assembled are authorised and required to do various acts therein mentioned, for the purpose of preserving health among the prisoners, and, amongst other things, to appoint an experienced surgeon or apothecary, at a *stated salary*, to attend to the prisoners in the gaol. This statute, which is general, and applies to all gaols whatever, was in operation until the passing of the 4 Geo. 4, c. 64, which repealed it so far as relates to county gaols, and the gaols of certain enumerated cities and boroughs, not including Ipswich. Although, however, it was so far repealed, yet, by

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the 33rd section of that statute, a provision nearly the same was introduced. It enacted, that the justices in general or quarter sessions assembled should, from time to time, appoint a surgeon to such of the prisons within their jurisdiction; and it further enacted, that it should be lawful for the justices, at any general or quarter sessions *after such appointment*, to direct a reasonable sum to be paid as salary to each surgeon, and also such sums of money as should be due for medicines. From the time, therefore, of the passing of this last statute, the appointment of the surgeon to all gaols continued to be exercised by the justices assembled in sessions, i. e. as to county gaols, and certain enumerated borough gaols, under the 4 Geo. 4, c. 64, s. 33, and as to all other borough gaols, under the old statute 14 Geo. 3, c. 59, s. 1.

So matters rested until the passing of the Municipal Reform Act, 5 & 6 Will. 4, c. 76. By the 116th section of that statute it is enacted, that the town council of the boroughs enumerated in the 4 Geo. 4, c. 64, should thenceforth have all the powers which the justices of sessions possessed under that act; and this clearly gave to the town council of the boroughs so enumerated, the power, *inter alia*, of appointing the surgeon. But, as Ipswich is not one of the places enumerated in the 4 Geo. 4, c. 64, the enactment did not affect that borough. The only other clause in the Municipal Act material to the present question, is the 105th, which enacts, that the recorder of every borough shall hold quarterly sessions of the peace, at which he shall be the sole judge, and such quarter sessions shall have cognisance of all crimes and matters whatsoever cognisable by any court of quarter sessions for counties, and the recorder shall have full power to do all things necessary for the exercise of that jurisdiction.

It seems to us, then, that under this clause the recorder, so far as relates to the boroughs not enumerated in the 4 Geo. 4, c. 64, had the same power of appointing a surgeon

as had been previously exercised by the borough justices in quarter sessions assembled.

Such was the principle on which the Court of Queen's Bench decided the cases of *Rex v. The Recorder of Hull* (a), *Rex v. The Inhabitants of St. Lawrence, Ludlow* (b), and some other cases.

The result therefore is, that, after the passing of the Municipal Act, the power of appointing the surgeon of the gaol was vested, as to the cities and boroughs enumerated in the 4 Geo. 4, c. 64, in the town council, and, as to the other boroughs regulated by the Municipal Act, in the recorder.

But this state of things did not last very long. Neither the town council nor the recorder were very fit functionaries for the ordering and governing of prisons, and accordingly, by an act passed two years after the passing of the Municipal Reform Act, namely, 7 Will. 4 & 1 Vict. c. 78, intituled "An Act to amend an Act for the Regulation of Municipal Corporations in England and Wales," it was enacted, in section 38, "that all the powers of regulation which before the passing of the Municipal Reform Act were possessed by the justices, and all things *by any Act of Parliament provided to be done at any quarter sessions of the peace in relation to the regulating of any such gaol*, should be exercised by the borough justices, who should for that purpose hold a quarter session at the usual time of holding quarterly sessions of the peace, provided that no order of the justices which should require the expenditure or payment of money should be of force until confirmed by the council."

The appointment of a surgeon is clearly an act provided by act of Parliament to be done at quarter sessions, in relation to the regulating of gaols. It forms one of several

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(b) 1 Adol. & E. 170.

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matters of regulation directed to be done by the 14 Geo. 3, c. 59, and as to which every gaoler was, by the 29 Geo. 3, c. 67, required to make regular returns, stating how far the exigency of the statute had been complied with.

The effect, therefore, of this last act of 7 Will. 4 & 1 Vict. c. 78, was to restore to the borough justices the power which they possessed, before the passing of the Municipal Act, of appointing a surgeon, only, instead of making the appointment when assembled in quarter sessions, they were to make it at a quarterly meeting held at the same time at which the quarter sessions of the peace is held: a provision rendered necessary by the change in the constitution of the court of quarter sessions, under which the justices ceased to be a constituent part of the court.

It may be observed, that the operation of the last statute was somewhat different in respect of the boroughs enumerated in the 4 Geo. 4, c. 64, and those not so enumerated. As to the latter, the justices, at the time of the passing of the Municipal Reform Act, appointed the surgeon under the provisions of the 14 Geo. 3, c. 59; whereas, in respect to the enumerated boroughs, the appointment was made by virtue of the 4 Geo. 4, c. 64, s. 34. Under the former statute, the justices are required to appoint a surgeon *at a stated salary*; whereas under the 4 Geo. 4, c. 64, s. 33, which regulates the course to be pursued as to the enumerated boroughs, the justices are simply to appoint a surgeon, and then, at every succeeding session, the justices are authorised to order a reasonable sum to be paid to him for salary and medicines. The appointment is complete without any reference to remuneration, the amount of which is to be fixed at some subsequent session.

Now Ipswich not being one of the enumerated boroughs, the duty of the justices, after the passing of the 7 Will. 4 & 1 Vict. c. 78, was to appoint a surgeon *at a stated*

salary; and it was argued that, under the proviso contained at the end of the 38th section of that statute, the appointment would be of no force until confirmed by the town council, inasmuch as the appointment necessarily entailed on the borough the payment of money. If it were necessary to decide this point, we should probably hold that the case did not come within the proviso in question. The appointment of an officer to watch over the health of the prisoners is hardly to be described as *an order* made by the justices. It is rather an act done by them in obedience to the positive injunction of an act of Parliament, and so not within the proviso at all.

It is, however, unnecessary to decide this point, for we are all of opinion that the effect of the 2 & 3 Vict. c. 56, s. 1, is to put all the boroughs regulated by the Municipal Act on the same footing as those which were previously regulated by the 4 Geo. 4, c. 64. The words of the enactment are, that the 4 Geo. 4, c. 64, subject to certain qualifications not material to the present question, shall extend to every gaol in England not used exclusively for the confinement of debtors, except the Queen's Bench and Fleet Prison, and the Milbank Penitentiary.

Now, before the passing of this last act, the 4 Geo. 4, c. 64, did extend to some boroughs, subject, however, to certain qualifications contained in the 7 Will. 4 & 1 Vict. c. 78, rendered absolutely necessary by the circumstance that, since the passing of the Municipal Act, the justices never can be assembled in quarter sessions, and therefore the 4 Geo. 4, c. 64, so far as it gives power to the justices in quarter sessions assembled, cannot be strictly in terms executed in any borough to which the Municipal Act applies. But we think that when the 2 & 3 Vict. c. 56, enacts that the 4 Geo. 4, c. 64, *shall extend* to all gaols, it must be construed with reference to the 7 Will. 4 & 1 Vict. c. 78. The meaning of the act was to put

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all borough gaols, with reference to the 4 Geo. 4, c. 64, on the same footing with the gaols of the boroughs therein enumerated, as if that statute had extended to *all* boroughs. It could not have been intended to repeal or affect the enactments of the 7 Will. 4 & 1 Vict. c. 78, which were absolutely necessary, in order to enable the provisions of the 4 Geo. 4, c. 64, to be carried into effect; and this was, we conceive, what was meant by Lord *Denman*, when he says, in the case of *Regina v. The Bishop of Bath and Wells* (a), that the statute 2 & 3 Vict. c. 56, *was framed with a view to the existing state of things in every borough*. It must be read as if it placed all boroughs in the schedule to the 4 Geo. 4, c. 64, so as to affect them all by the provisions of that act, and by all subsequent enactments relative thereto.

The result, therefore, of our judgment is, that the plaintiff was duly appointed surgeon by the justices, on the 25th of July, 1845, and as he certainly continued to hold that office on the 10th of November, 1845, he is, by the express agreement of the parties, entitled to judgment.

Judgment for the plaintiff.

(a) 5 Q. B. 162.

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June 1.

A WRIT of audita querela having issued in this case,

In an audita querela, the Court granted a rule absolute for a supersedeas, together with a venire facias.

G. Pollock moved for a writ of supersedeas to the sheriff to stay execution, and also for a venire facias. The practice appeared to be, that, if the plaintiff was in execution, the process was by scire facias; but if not, a venire facias issued. The following authorities were referred to:—*Com. Dig.*, tit. “Audita Querela,” (E. 1), (E. 5); *Turner v. Davies* (a); *Vin. Abr.* “Audita Querela,” (N. 2); *Noy*, 145; *Fitz. Abr.* 238; *Rastal*, 97; *Reg. Brev.*, 114.

PER CURIAM.—Take a rule absolute.

Rule absolute (b).

(a) 2 Saund. 148 b.

(b) The following is the rule as drawn up:—“Upon the motion of &c., counsel for George Giles, the plaintiff above named, and upon reading the writ of audita querela issued herein, with the allowance thereof indorsed thereon, and the rule made in the cause of *Hutt and Another v. Giles*, whereby execu-

tion was stayed for a month, on the terms of the defendant undertaking within that time to issue a writ of audita querela; it is ordered, that the said George Giles, the plaintiff above named, be at liberty to issue a supersedeas to the sheriff to stay execution, together with a writ of venire facias thereon.”

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June 1. VOGEL and Another, Executors of ANN VOGEL, deceased,
v. THOMPSON.

An affidavit in support of a rule absolute for judgment on a scire facias at the suit of executors, must shew that probate has been granted to them.

MILLER moved for a rule absolute for judgment upon a scire facias, on the sheriff's return of nulla bona, and in default of appearance. The affidavit in support of the application stated in substance, that Ann Vogel, deceased, recovered a judgment against the defendant for 45*l.* 14*s.*—that she died, having duly made her last will and testament, whereby she appointed the plaintiffs her executors,—that a writ of scire facias issued to revive the judgment, which was lodged at the sheriff's office, and the sheriff returned nulla bona,—that the defendant had been served with a copy of the writ of scire facias, and with notice that, in default of appearance, judgment would be obtained thereon. But the affidavit did not state that probate had been granted to the plaintiffs, and on that ground the Master thought it insufficient to warrant the entry of judgment. It was submitted, that though the affidavit would not be sufficient in a case in which the defendant had not been summoned, yet as here the defendant had received notice of the proceedings, it was in his power to ascertain whether probate had been granted. But,

PER CURIAM,—Before the Court grant judgment, they ought to be fully satisfied that probate has been taken out. The affidavit must be amended, by stating that the plaintiffs obtained probate.

Rule refused.

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EAGER v. GRIMWOOD.

June 1.

TRESPASS for assaulting and debauching the daughter and servant of the plaintiff, whereby she then became pregnant, &c., and the plaintiff lost and was deprived of her services. Plea, not guilty.

At the trial before *Pollock*, C. B., at the London sittings after last Michaelmas Term, the following facts appeared:—The connexion between the defendant and the plaintiff's daughter took place for the first time two days after Christmas-day, 1844. In June, 1845, the plaintiff's daughter gave birth to a child, which, according to the evidence of a surgeon, was a full-grown child. It also appeared that the plaintiff had been put to some expense in consequence of his daughter's illness. The learned Chief Baron left it to the jury to say whether or no the defendant was the father of the child; and he told them that if they believed he was not the father of the child, they should find a verdict for him. The jury having found for the defendant,

An action for seduction cannot be maintained without some proof of loss of service thereby; therefore, where it appeared that the defendant had debauched the plaintiff's daughter, and that she was delivered of a child, but the jury found that the child was not the defendant's:—*Held*, that the jury were rightly directed to find a verdict for the defendant.

Prentice obtained a rule nisi for a new trial, on the ground of misdirection; against which

Humfrey shewed cause.—The question is, whether mere criminal knowledge, unattended with loss of service or pecuniary damage, gives the master a right of action against the seducer. It is submitted that it does not, and that there is no foundation for the action, unless the master sustains some loss of service by reason of the seduction. If it were not so, he would have a right of action for any slight blow which resulted in no injury whatever to the servant. [*Alderson*, B.—If we were to hold, in this case, that there was a loss of service, it would be difficult to say where it would stop; for instance, if a servant took a walk against

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the orders of her master, that would amount to a loss of service.] In Selwyn's *Nisi Prius*, tit. "Master and Servant," p. 1103, there is the following note:—"Although the daughter cannot have an action, yet the father may, not for assaulting his daughter, and getting her with child, because this is a wrong particularly done to her, yet *for the loss of her service, caused by this*. Per *Rolle*, C. J., *Norton v. Jason*, Sty. 398." [*Rolfe*, B.—In that case *Rolle*, C. J., says—"But for the other point, the cause of action is per quod servitium amisit, and for this he hath brought it within the time limited by the statute; for it is an action upon the case, although the *causa causans* is the *vi et armis*, which is but inducement to the action, and the *causa causata*, viz. the loss of service, is the ground of the action."] The seduction is not a trespass, unless it result in a loss of service. A master might maintain an action for striking his servant, per quod he was deprived of her services; but if the per quod were omitted, the declaration would be bad. [*Platt*, B.—In *Chamberlain v. Hazlewood* (a), it was held that an action for seducing the daughter and servant of the plaintiff might be brought either in trespass for the direct injury, per quod servitium amisit, or in case for the consequential damage. Trespass is the form usually adopted: *Ditcham v. Bond* (b), *Woodward v. Walton* (c).] It is a trespass on the servant, of which the master cannot complain, unless it causes him some loss of service. In the present case there was no loss of service occasioned by the act of the defendant, as he was not the father of the child.

Prentice, in support of the rule.—When the service is once established, the law presumes some loss to the master by reason of the assault. The declaration would be good, if it merely stated that the defendant assaulted and de-

(a) 5 M. & W. 515.

(b) 2 N. R. 476.

(c) 5 Q. B. 297.

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bauched the plaintiff's servant, for in such case the law would imply a nominal damage. The damage alleged in this declaration is either special or consequential damage; if the former, not being traversed, it is admitted on the record: *Torrence v. Gibbins* (a). [Alderson, B.—Upon the plea of not guilty, if it appeared that the party seduced was in the service of a third person, according to your argument, the plaintiff would be entitled to a verdict.] To an action of this kind the defendant could not plead that the plaintiff had not sustained any damage by the assault. In Viner's Abridgment, tit. "Trespass," (L. 6), pl. 7, it is said, "In trespass of battery of his servant, per quod servitium suum amisit, &c., it is no plea that non amisit servitium servientis prædicti, for by this the battery is confessed, and then the law implies that the master is damnified. But it is a good plea that he was not his servant at the time. Br. 'Traverse,' per &c., pl. 378, cites 31 Hen. 6." [Pollock, C. B.—In the next paragraph it is said, "The master shall not have trespass of battery of his servant, if he does not say per quod servitium servientis sui amisit," &c. You must contend, that if the injury produces nothing but pain, both master and servant may maintain the action.] Damage is presumed to have been sustained, whenever an injury is done to the right of a party: *Fay v. Prentice* (b). The debauching of the plaintiff's servant is an act of trespass, *Woodward v. Walton* (c), and an invasion of the legal right of the plaintiff, who has a kind of property in her. [Alderson, B.—No: the plaintiff has only a right to her service.]

POLLOCK, C. B.—The case of *Grinnell v. Wells* (d) is precisely in point. That case decided, that an action for seduction cannot be maintained without proof of loss of service. *Tindal*, C. J., in delivering the judgment of the

(a) 5 Q. B. 297.

(b) 1 C. B. 828.

(c) 2 N. R. 476.

(d) 7 Man. & G. 1033.

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Court, says—"The foundation of the action by a father to recover damages against the wrong-doer, for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest." The rule must be absolute to enter a nonsuit, unless the plaintiff will consent to a *stet processus*.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule accordingly.



June 1.

BRITT v. PASHLEY and Others.

An order of reference contained a clause restraining either party from bringing or prosecuting any action or suit in any Court concerning the premises referred to:—
Held, that the finding of the arbitrator was conclusive, and that the plaintiff could not afterwards move for judgment non obstante veredicto.

TRESPASS. The declaration stated, that the defendants, on &c., with force and arms &c., broke and entered a certain dwelling-house of the plaintiff, situate &c., and then forced and broke open, broke to pieces, and damaged the outer-door of the plaintiff, of and belonging to the said dwelling-house, and broke to pieces, damaged, and spoiled divers locks &c., and then seized and took divers goods and chattels, to wit &c., and then cast and threw the same about, and then carried away the same out of the said house, and cast and threw the same upon the ground, &c.

The defendant pleaded, amongst other pleas, fourthly, to the whole declaration, that the dwelling-house in which &c., was the dwelling-house, soil, and freehold of some of the defendants, wherefore they in their own right, and the other defendants as their servants, and by their command, broke and entered the dwelling-house; and because the said goods and chattels were wrongfully in the dwelling-house, the de-

defendants seized and took them, and a little cast and threw them about &c., and removed them out of the house to a small and convenient distance, and there left them for the use of the plaintiff.

To this plea the plaintiff replied, that the dwelling-house was not the soil and freehold of the defendants, upon which issue was joined.

The cause came on for trial at the Derbyshire Summer Assizes, 1846, when it was, with all matters in difference, referred to arbitration, the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The order of reference contained the following clause:—"And it is ordered by and with such consent as aforesaid, that neither party do bring or prosecute any action or suit in any court of law or equity, against the said arbitrator, or against each other, for any matter concerning the premises so as aforesaid referred."

The arbitrator having found the issue on the above plea for the defendants, a rule was obtained, calling on them to shew cause why judgment should not be entered for the plaintiff non obstante veredicto, as to the goods and chattels mentioned in the declaration, on the ground that the plea afforded no answer to the trespass in respect of them.

Humfrey shewed cause.—The terms of the submission preclude the plaintiff from moving for judgment non obstante veredicto. Where an order of reference contains a clause restraining the parties from bringing a writ of error, they cannot move in arrest of judgment: *Chownes v. Brown* (a). It is true that in this case the submission does not expressly mention a writ of error, but it is included in the terms "any action or suit in any court of law." In *Steeple v. Bonsall* (b), it was held that the arbitrator's power was complete and final, and that after an award made it was not competent

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(a) 2 D. & L. 706.

(b) 4 Adol. & E. 950.

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for the plaintiff to move for judgment non obstante veredicto, and the Court so decided without reference to any special clause restraining the parties from bringing a writ of error. The plaintiff should have applied to the arbitrator to enter up judgment non obstante veredicto.

Whitehurst and *Miller* shewed cause.—As the costs of the cause abide the event, the plaintiff is entitled to have the proper judgment entered on the record. The arbitrator had no power to award judgment non obstante veredicto: *Angus v. Redford* (a). All he could do was to find certain facts, and direct for whom and for what amount the verdict should be entered. The Court then give the judgment with reference to his finding. If a declaration contained several counts, one of which was clearly bad, the Court would not allow an erroneous judgment to be entered on that count. In *Chownes v. Brown*, the order of reference contained an express stipulation that the parties should not bring a writ of error, and the case was decided on that ground. In the report of *Steeple v. Bonsall*, the precise terms of the order of reference do not appear. In *Manser v. Heaver* (b), the Court said, “that if there appeared a defect on the face of the award, it might be taken advantage of to invalidate a judgment and execution, as well as to prevent an attachment, though after the time for setting aside the award.” If the Court will interfere to set aside the judgment, they will in like manner give judgment non obstante veredicto.

ALDERSON, B.—This case is entirely governed by *Steeple v. Bonsall*. There Sir *W. Follett* argued, that the parties ought not to be prevented from taking the opinion of the Court as to the legal effect of the finding in the award. The question was whether, upon a bad plea, the plaintiff

(a) 11 M. & W. 69.

(b) 3 B. & Ad. 295.

should not be allowed to enter up judgment non obstante veredicto, and the Court refused to do so, saying, that "the arbitrator had power to do what the Court could do, and his award, therefore, put an end to the proceedings." In this case, the arbitrator finds for the defendant, and the Court gives the same judgment. If it is not competent for the plaintiff to reverse that judgment by writ of error, he cannot have judgment non obstante veredicto.

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ROLFE, B.—The present case is much stronger than *Steeple v. Bonsall*.

POLLOCK, C. B., and PLATT, B., concurred.

Rule discharged.

COOK v. MOYLAN.

June 2.

ASSUMPSIT. The first count of the declaration was for the use and occupation of certain rooms and apartments of the plaintiff by the defendant, together with certain household goods, furniture, and other necessities, goods and chattels of the plaintiff, in and parcel of a certain dwelling-house, by the defendant at his request, and by the sufferance and permission of the plaintiff, for a long space of time before then elapsed, used, and occupied, &c., together with certain household furniture and other necessities, goods and chattels of the plaintiff therein being, &c.

To an action of assumpsit for the use and occupation of furnished apartments, the defendant pleaded, that before he occupied the apartments by the permission of the plaintiff, he held them as tenant under a demise from one A. B., whose property

they were; that while he so held them, A. B. assigned them to the plaintiff; that the defendant became indebted in respect of the apartments, and that he paid A. B. a certain sum of money for them, by whom it was accepted in satisfaction of the debt. Averment, that the defendant never had notice of the assignment to the plaintiff, that he never agreed to become the plaintiff's tenant, that he never expressly requested the plaintiff to permit him to occupy the apartments, and that he never expressly promised the plaintiff to pay him for them:—*Held*, that the plea amounted to the general issue.

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The defendant pleaded, secondly, to the first count, except as to the sum of 3*l.* 3*s.*, that before he had held and occupied, used and enjoyed, the said rooms and apartments, household furniture and necessaries, goods and chattels, by the sufferance and permission of the plaintiff, as in the first count mentioned, he had held and occupied, possessed and enjoyed, the same by the sufferance and permission of one A. B., as tenant to the said A. B., under a demise thereof, heretofore, to wit, on &c., made by the said A. B. to the defendant, the same then being the rooms, apartments, household furniture, necessaries, goods and chattels of the said A. B.; and whilst the defendant so had held, used, occupied, possessed and enjoyed the said rooms, apartments, household furniture, necessaries, goods and chattels, by the sufferance and permission of the said A. B., as her tenant as aforesaid, under the said demise, and before the use and occupation in the first count mentioned, to wit, on &c., the said A. B. assigned and granted to the plaintiff all her estate, interest, and property in the said rooms, apartments, household furniture, necessaries, goods and chattels, and in reversion thereto, of her the said A. B. expectant on the determination of the said demise; and the use and occupation in the first count mentioned, except that part thereof for which the said sum of 3*l.* 3*s.*, parcel &c., is claimed, was and is a use and occupation after the said grant and assignment, in continuation of, and under and by virtue of the same tenancy and demise under which the defendant so held the same under the said A. B. as aforesaid. And the defendant further says, that after the use and occupation in the first count mentioned, except as before excepted, and after the defendant became and was indebted in respect thereof, as in the first count mentioned, and before the commencement of this suit, to wit, on &c., the defendant paid to the said A. B., and the said A. B. then accepted of the defendant, a large sum of money, to wit, to the amount of the monies in the first count men-

tioned, except the said sum of 3*l.* 3*s.*, parcel &c., in full satisfaction and discharge of the said monies in the first count mentioned, except the said sum of 3*l.* 3*s.*, parcel &c., and of all damages and causes of actions in respect thereof. And the defendant further says, that no notice was given to him of the said grant and assignment by or on behalf of the plaintiff, so being the grantee and assignee thereunder, at any time before or at the time of the said payment, nor did the defendant ever attorn or become tenant to, or assent or agree, to have, hold, use, occupy, possess, or enjoy, the said rooms, apartments, household furniture, necessaries, goods and chattels, or any of them, or any part thereof, as tenant thereof to the plaintiff, or otherwise under or of the plaintiff, or by his sufferance or permission, nor did he ever expressly request the plaintiff to suffer or permit him the defendant to have, hold, use, occupy, possess or enjoy the same, or any of them, or any part thereof, nor did he ever expressly promise the plaintiff to pay to him the money in the first count mentioned, except as to the said sum of 3*l.* 3*s.*, parcel &c. Verification.

To this plea the plaintiff demurred specially, on the ground that it amounted to the general issue.

Creasy, in support of the demurrer.—This plea is framed upon the 9th and 10th sections of the 4th of Anne, c. 16; but as the plaintiff's claim is not confined to realty, but includes chattels, the defence does not fall within the meaning of the act, and consequently the plea is bad on general demurrer. [*Alderson*, B.—The contract is stated as an entire one for furnished rooms.]

The plea is bad for the reasons assigned by the special demurrer. Until notice is given by the assignee, he has no right of action against the tenant; the necessity for attornment is removed by the statute, but the assignee's right to the rent only accrues on giving the tenant notice of the assignment. Now in this plea the defendant alleges that he

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never had such notice, which is a denial that his liability to the assignee ever arose: the plea is consequently bad as amounting to the general issue. In *Moss v. Gallimore* (a) it was held that a mortgagee, after giving notice of the mortgage to a tenant in possession, under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice. Again, in *Waddilove v. Barnett* (b), which was an action for use and occupation, it was held that the defendant might, under the general issue, give in evidence that the plaintiff had mortgaged the premises before the defendant came into occupation, and that the mortgagee had given notice to the defendant not to pay to the plaintiff any rent becoming due after such notice. It would seem from these cases, that the liability of the tenant to the assignee does not arise until he has received such notice. The case of *Lumley v. Hodgson* (c) is to the same effect. *Wightman, J.*, in his judgment in the case of *Burrowes v. Gradin* (d), says, "Whenever, therefore, a mortgagor conveys his estate to a mortgagee, the tenants of the former become tenants of the latter, subject to all the ordinary incidents of such a relation, amongst which is that of being liable to an action for use and occupation to recover arrears of rent accruing after the mortgage, and remaining unpaid after notice of the mortgage is given." [*Alderson, B.*—The mortgagee's right to the rent commences from the time of the mortgage, and not of the notice.]

Lastly, the plea amounts to the general issue, for containing a statement in the concluding part of it, that "the defendant never expressly promised the plaintiff to pay him the money in the first count, except &c." This is a denial of the promise laid in the declaration. There is no distinc-

(a) Doug. 279.

(c) 16 East, 99.

(b) 2 Bing. N. C. 538; 2 Scott,

(d) 1 Dowl. & L. 218.

tion, in pleading, between an express and an implied promise: *Kinder v. Paris* (a). The allegation, therefore, is a mere denial of the promise in the declaration, and renders the plea bad.

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Hawkins, in support of the plea.—As to the last point, the allegation in the plea only negatives any express understanding between the parties. The defendant intends to shew by it, that it is the legal sufferance by which he held the premises of the plaintiff, and to negative any express contract. It is therefore a mere explanation of the previous part of the plea, which is a special plea of payment under the statute; and that allegation does not vitiate the plea.

PER CURIAM (b).—We think the words in the latter part of the plea make it amount to the general issue, but it is a good plea without them. The defendant, however, may amend by striking them out, otherwise there must be judgment for the plaintiff.

Leave to amend accordingly, otherwise

Judgment for the plaintiff.

(a) 2 H. Bl. 563, n.

(b) *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., *Platt*, B.

DYER v. GREEN.

June 3.

THIS was an interpleader issue, to try whether certain goods and chattels taken in execution by the defendant were the property of the plaintiff. At the trial before

On the trial of an interpleader issue, the plaintiff tendered in evidence a bill of

sale and schedule, the former of which assigned to him "all the goods, fixtures, household furniture, plate, china, &c., in and about a messuage, tenement, and premises, where he now resides, and being No. 2, Park Road, Old Kent Road, in the county of Surrey, and the chief articles whereof are particularly enumerated and described in a certain schedule hereunto annexed." The schedule was in no way annexed to the deed, and was inadmissible for want of a stamp:—*Held*, that the bill of sale was admissible in evidence without the schedule.

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Pollock, C. B., at the Middlesex sittings in last Hilary Term, the plaintiff, in proof of his title to the goods, tendered in evidence a bill of sale to him of the property in question, together with a schedule, which enumerated several of the articles. The bill of sale stated, that C. Dyer and L. Dyer did thereby bargain, sell, assign, and transfer to the plaintiff, "all the goods, fixtures, household effects, plate, china, and effects of whatever nature or kind, belonging to us, and in and about the messuage, tenement, or premises, where he now resides, and being No. 2, Park Road, Old Kent Road, in the county of Surrey, and the chief articles whereof are *particularly enumerated and described in a certain schedule hereunto annexed.*" On these documents being produced, it appeared that the schedule was not in any way annexed to the bill of sale, nor was it stamped. It was objected, on the part of the defendant, that the schedule, being a separate instrument, required a stamp. The learned judge was of that opinion, and refused to receive it in evidence. The bill of sale was then tendered alone, and was objected to, as being incomplete without the schedule. The learned judge thought that as the bill of sale referred to the schedule, the latter was an instrument explanatory of the mode in which the former operated, and that both ought to be proved. A verdict having been found for the defendant,

Watson obtained a rule nisi for a new trial, on the ground of the improper rejection of this evidence.

Wells shewed cause.—The bill of sale was not admissible in evidence without the schedule, the two documents having been executed at the same time. In *Weeks v. Maillardet* (a), where the defendant bound himself to deliver to the plaintiff, "the whole of his mechanical pieces, *as per schedule an-*

(a) 14 East, 568.

needed," it was held that the schedule formed part of the deed, without which it would be insensible. [*Alderson*, B.—In that case all the articles were enumerated in the schedule—here they are not, which shews that the deed has an operation independently of the schedule.] It is submitted that the only articles which pass under this bill of sale are those enumerated in the schedule. The latter is incorporated with the former, and restrains its operation: *Burgh v. Preston* (a). [*Rolfe*, B.—The bill of sale does not become uncertain, by saying that the articles are described in the schedule. *Platt*, B.—Suppose the deed had stated that the goods had been bought of A. B., would it be necessary to prove that they were so bought?] There was distinct evidence to shew that the goods enumerated in the schedule were those intended to be passed by the bill of sale. [*Pollock*, C. B.—If *Duck v. Braddyll* (b) had been cited at the trial, I should have received the deed without the inventory. In that case it was held, that a deed legally stamped is not vitiated by referring to inventories which are not stamped. The question here is, does the deed operate without the inventory; if it does, the inventory is merely referred to as a memorandum, for the more certain knowledge of the articles.]

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Watson was not called upon to support the rule.

ALDERSON, B.—The rule must be absolute for a new trial. The deed must be considered as enumerating all the articles: it in fact does so, by describing them as the articles in a particular house. In the case of *Weeks v. Maillardet*, the defendant bound himself to deliver all the articles mentioned in a schedule, so that the deed was insensible without the schedule;—it was a conveyance of a certain number of

(a) 8 T. R. 483.

(b) M'Clel. 217; 13 Price, 455.

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uncertain articles. Here the deed is sensible without the schedule.

POLLOCK, C. B., ROLFE, B., and PLATT, B., concurred.

Rule absolute.

June 3.

SEMPLE v. PINK.

A declaration stated, that L. made his promissory note payable to the plaintiff: that the note being in the plaintiff's hands overdue and unpaid, in consideration that the plaintiff would forbear and give time to L. for payment of the note, to wit, for a reasonable time, the defendant promised to pay the note, in case L. should make default. It then alleged that L. made default, and

THE declaration stated, that one J. Leigh made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff or his order £200 for value received, three months after the date thereof, which period had elapsed before the making of the promise of the defendant hereinafter next mentioned; but the said J. Leigh did not pay the amount of the said note when the same became due, and the amount of the said promissory note being wholly unpaid to the plaintiff, and the said note being then in the plaintiff's hands overdue and unpaid, thereupon, heretofore, to wit, on the 2nd of November 1844, in consideration of the premises, and that the plaintiff, at the request of the defendant, would hold over the said promissory note, and would forbear and give time to the said J. Leigh for the payment of the said monies in

that defendant did not pay the amount of the note. Plea, non assumpsit. At the trial, it appeared that the defendant, having agreed to guarantee the payment of the note by L., indorsed on the back thereof as follows:—"I guarantee the payment of the within note by L., the maker, on the 2nd November next." On that day, the note being due and dishonoured, the defendant signed the following memorandum, addressed to the plaintiff:—"Sir, I request you will hold over the promissory note in your favour, of L., dated 31st July, 1844, for £200, at three months, and in consideration of your so doing, I undertake to continue in all respects my guarantee of the same:"—*Held*, that the guarantee was defective; also that there was no evidence to support the declaration.

Semble, that the declaration was bad, in stating the consideration to be forbearance to sue for a reasonable time.

and by the said promissory note payable, to wit, *for a reasonable time then next following*, the defendant then guaranteed and promised the plaintiff to be answerable to him, the plaintiff, for the payment of the said monies due and payable upon and by virtue of the said promissory note, and to pay him the same, in case the said J. Leigh should make default in paying the same. Averment, that although more than a reasonable time for the plaintiff's forbearing and holding over the said note had elapsed before the commencement of this suit, and although the plaintiff, confiding in the promise of the defendant, did then, to wit, on &c., hold over the promissory note, and forbear and give time to J. Leigh for the payment of the said sum of money, and hath thence, and for more than a reasonable time in that behalf, to wit, from thence hitherto, held over the said note, and forborne and given time for payment of the said note: yet J. Leigh hath not paid the monies in and by the said promissory note due and payable, whereof the defendant had notice, and was requested by the plaintiff to pay him, but the defendant hath not paid the same or any part thereof.

Plea, non assumpsit.

At the trial, before *Rolfe*, C. B., at the Middlesex sittings in last Hilary Term, the following facts appeared:—In July, 1844, the plaintiff agreed to discount a promissory note for £200 for J. Leigh, if the defendant would guarantee payment of the same when due; the defendant having agreed to do so, the note set out in the declaration was made, upon the back of which the defendant wrote the following words—"I do hereby guarantee the payment of the within promissory note by James Leigh, the maker, for the 2nd day of November next—John Pink." The note became due on the 2nd of November, and was dishonoured, and whilst the plaintiff was the holder of it, the defendant signed the following memorandum, addressed to the plaintiff:—

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"Blomfield Road, Maida Hill,

Nov. 2, 1844.

"I request you will hold over the promissory note in your favour, of Mr. James Leigh, dated 31st July, 1844, for £200 at three months, and in consideration of your so doing, I undertake to continue in all respects my guarantee of the same.

"I am, Sir, yours truly,

"Mr. A. Semple, jun."

"JOHN PINK.

It was objected, on the part of the defendant, that there was no evidence of the guarantee set out in the declaration, and that the plaintiff ought to be nonsuited. The learned judge was of that opinion, and directed a nonsuit, reserving liberty to the plaintiff to move to enter a verdict for the amount of the note.

Miller having obtained a rule nisi accordingly,

Ogle shewed cause.—The plaintiff was properly nonsuited. The plea of non assumpsit puts in issue not only the promise, but also the consideration on which it is founded. The consideration stated in this declaration is forbearance *for a reasonable time*, but there was no evidence of such consideration. The memorandum of the 2nd of November mentions no time for which the plaintiff was to hold over the note, and the pleader is not warranted in treating it as a contract to forbear for a reasonable time. Even if the memorandum be read together with the indorsement on the back of the note, the two documents will not support the declaration, for the latter is merely an undertaking to pay the note when due, and the former an agreement to continue a guarantee, not founded on any consideration. Mere forbearance is not a sufficient consideration to support a promise to pay the debt of another ; but there must be a forbearance for a *certain* or *reasonable*

time. Chitty on "Contracts," p. 30: *Cole v. Dyer* (a). The law will not imply any such consideration from the terms of these instruments.

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Miller, in support of the rule.—The memorandum of the 2nd of November supports the declaration. It is a rule of law, that where no time is mentioned in a contract, the law implies a reasonable time. Where a party undertakes to deduce title to an estate, he has a reasonable time for that purpose. [*Alderson*, B.—Making out a title is an act which necessarily requires *some* time; but suppose, in this case, the plaintiff had brought his action the next minute, would that be a forbearance? In a case like the present, what definite idea can you attach to forbearance for a reasonable time? The meaning of the words may depend upon the character of the party—whether he is litigious, or whether he is mild and somnolent. It will be found that the cases in which the law implies a reasonable time, are those in which the particular act requires some time to do it. *Rolfe*, B.—The declaration seems to be bad. *Alderson*, B.—The guarantee itself is defective.]

PER CURIAM (b).—The rule must be discharged.

Rule discharged.

(a) 1 C. & J. 461.

(b) *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

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June 7.

LANSDALE v. CLARKE and Another.

The replication de injuriâ is good to a plea which sets up a defence under the Tippling Act, 24 Geo. 2, c. 40, s. 12.

DEBT for goods sold and delivered, and on an account stated.—Second plea: And for a further plea, as to the sum of 11*l.* 18*s.* 6*d.*, parcel of the monies in the first count of the declaration mentioned, and as to the sum of 11*l.* 18*s.* 6*d.*, parcel of the monies in the last count mentioned, the defendants say, that the said sum of 11*l.* 18*s.* 6*d.*, so found to be due to the plaintiff on an account stated, as in the said last count mentioned, is the same sum of 11*l.* 18*s.* 6*d.*, parcel of the said sum of money in the said first count mentioned, and that the said two sums of 11*l.* 18*s.* 6*d.* each are one and the same debt of 11*l.* 18*s.* 6*d.*, and not other or different debts of 11*l.* 18*s.* 6*d.*; and that the said account stated was stated of and concerning, and included, the said sum in the first count mentioned, and no other sum or cause of action whatever; and the defendants further say, as to the causes of action in the introductory part of this plea mentioned, as to the said sum of 11*l.* 18*s.* 6*d.*, that the said sum of 11*l.* 18*s.* 6*d.* was and is a certain sum or demand claimed by the plaintiff from the said defendants, for and in respect of certain spirituous liquors by him the plaintiff supplied to the defendants at divers days and times between &c., and not a debt or demand for or in respect of any other or different matter, and that no part of the said sum or demand of 11*l.* 18*s.* 6*d.*, as last aforesaid, hath been or was bonâ fide contracted by the defendants at any one time, to the amount of 20*s.* or upwards.—Verification.

Replication, de injuriâ.

Special demurrer, assigning for causes, that the plea is in absolute bar and extinguishment of the rights of action to which it is pleaded, and shews that the plaintiff never had any right to sue as to these rights of action, and that it is not in excuse; and that, therefore, the replication de injuriâ is improper. Joinder in demurrer.

Hawkins, in support of the demurrer.—This plea is framed under the 12th sect. of the 24 Geo. 2, c. 40, by which it is enacted, that “no person or persons whatsoever shall be entitled unto, or maintain any cause, action, or suit for, or recover either in law or equity, any sum or sums of money, debt or demands whatsoever, for or on account of any spirituous liquors, unless such debt shall have really been and bonâ fide contracted, at one time, to the amount of twenty shillings or upwards.” By this section of the act, the sale of spirituous liquors is absolutely prohibited, where the amount supplied at any one time is not of the value of twenty shillings. *Abbott*, C. J., in *Burnyeat v. Hutchinson* (a), in delivering the judgment of the Court, said, “The words of the act are free from doubt; they contain a general and absolute prohibition of the sale of spirits, unless delivered in quantities amounting to more than twenty shillings in value at one time. We are, however, desirous to narrow the construction, by introducing the qualifications of a sale to the consumer himself, and by confining it to the case where the spirits have been sold alone. But it would be a great evil to introduce such qualifications; and I think, if we did so, we should defeat the intention of the legislature.” That case was referred to by *Denman*, C. J., in delivering judgment in the case of *Hughes v. Done* (b), where he says, “We all agree to this construction, and think we ought to adopt it.” The plea, therefore, does not confess that any debt was ever due from the defendants to the plaintiff; it states that the goods were supplied, yet it shews that the defendants were never indebted for them. The plea, in effect, amounts to the general issue, although it does not in form. [*Alderson*, B.—This is a good plea in confession and avoidance, and the defence could not be given in evidence under the general issue; illegality of consideration must be pleaded. This is a contract in form, though not in substance. *Platt*, B.

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(a) 5 B. & Ald. 241.

(b) 1 Q. B. 294.

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—The words of the act are, that “no person or persons shall be entitled unto, or maintain any cause, action, or suit for, or recover either in law or equity, any sum or sums of money, *debt* or demands whatsoever, for or on account of any spirituous liquors, unless such *debt*,” &c.] In *Pelly v. Rose* (a), which was an action of debt to recover certain duties imposed by the Ramsgate Harbour Act (b), the defendant pleaded a plea, which brought him within the exempting clause; and it was held, that the replication *de injuriâ* was improper, as the plea amounted to a denial that any debt became due from the defendant, and was not in excuse, but in fact, that it amounted to the general issue. Here, for the same reason, the plea in effect amounts to the general issue, and the replication *de injuriâ* is improper.

Cowling, contra, was not called upon by the Court.

POLLOCK, C. B.—I am of opinion that the replication *de injuriâ*, in the present case, is proper. The plea sets up illegality in the transaction, and I think that in such case this form of replication is good, and that this is in accordance with the opinion expressed by this Court in *Cooper v. Garbett* (c). Although the facts stated in the plea render the contract not binding, and so amount to a denial that there was any binding contract, they admit a contract in fact, and excuse its performance. I am therefore of opinion that the replication is good.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

(a) 12 M. & W. 435.

(b) 32 Geo. 3, c. lxxiv.

(c) 13 M. & W. 33.

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CARTER v. WORMALD.

June 7.

ASSUMPSIT. The first count of the declaration was by indorsee against maker of a promissory note for 522*l.* 10*s.*, made by the defendant on the 29th day of September, 1840, and payable two months after date. Plea, that the said promissory note in the said first count mentioned was made by the defendant and one R. G. Edwards, and not by any other person or persons whatever; and that heretofore and after the making of the said promissory note, and after the indorsement thereof to the plaintiff, as in the said first count mentioned, and whilst the plaintiff held the same as such indorsee as aforesaid, to wit, on &c., the defendant and the said R. G. Edwards, who had been and then was the partner of him the defendant, in the profession and practice of an attorney and solicitor, which he the defendant during that time and then exercised and carried on, according to the form of the statute in that case made and provided, delivered to the plaintiff nineteen signed bills of fees, charges, and disbursements, of them the defendant and the said R. G. Edwards, in a certain cause, being the cause hereinafter next mentioned, and other causes and matters, and thereupon afterwards, and after the said delivery of the said signed bills, and every of them, and after the said indorsement of the said promissory note to the plaintiff, and whilst the plaintiff held such promissory note as indorsee as aforesaid, and after the said promissory note was due and payable according to the tenor and effect thereof, and before the commencement of this suit, to wit, on &c., by a certain order then made by the Hon. Mr. Justice *Williams*, then being one of the justices of Her Majesty's Court of

To an action by indorsee against maker of a promissory note, the defendant pleaded, that the note was made by himself and one A. B., his partner, and that, whilst the plaintiff held the note, the defendant and A. B. delivered to the plaintiff nineteen signed bills of costs, &c., which were referred to taxation; that it was agreed that the balance found to be due from the plaintiff to the defendant and A. B. should be applied in part payment of the note, and that the balance of the note, with interest, should be secured by a judgment, payable at certain periods, which had elapsed before the commencement of the suit; that the taxation had not been completed, and that the balance was not ascertained; that the defendant and A. B. had always been ready and willing to apply the balance due to the defendant towards the payment of the note, and to secure the balance due on the note by a judgment, in accordance with the agreement:—*Held*, that the plea was bad on general demurrer.

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Queen's Bench, in a certain action then depending in the same court, wherein the plaintiff herein was plaintiff, and one James Hieron was defendant, and which order bore date, to wit, the day and year last aforesaid, upon the hearing of the attornies or agents on both sides, it was ordered, that the said nineteen signed bills of fees, charges, and disbursements, should be referred to the Master to be taxed (Mr. John Brooks having undertaken to pay what upon such taxation might appear to be due), that the said defendant and the said R. G. Edwards should give credit for all sums of money by them received from or on account of the plaintiff, and also for rent then due to the plaintiff, and for all sums of money properly paid by the plaintiff to Mr. John Brooks, on account of some of the said bills of costs, and that the defendant and the said R. G. Edwards should refund what (if any thing) they might on such taxation appear to have been overpaid; and by consent it was thereby further ordered, that, upon payment by the said John Brooks, or refunding by the defendant and the said R. G. Edwards (as the case might be), the defendant and the said R. G. Edwards should deliver up to the plaintiff all deeds, books, papers, and writings, in their possession, custody, or power, belonging to the said plaintiff; and the defendant further saith, that the said Mr. John Brooks then gave the said undertaking for and on behalf of the plaintiff, and at his request and for his benefit, and that afterwards, and after the date and making of the said order, and whilst the plaintiff held such promissory note as such indorsee thereof as aforesaid, and before the commencement of this suit, to wit, on &c., it was agreed by and between the plaintiff and the defendant and the said R. G. Edwards, that the balance (if any) found due from the plaintiff to them the said defendant and R. G. Edwards, upon the taxation of the costs under the said order, should be applied in part payment of the said promissory note, and that the balance of the said promissory note, with interest, should be secured by a judgment, for

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£50 and interest thereon, payable on the 20th day of November then next (and which elapsed before the commencement of this suit), and a moiety of the balance and interest on the 24th day of March, 1842 (and which elapsed before the commencement of this suit), and the remainder, with interest, on the 24th day of June, 1842 (which had also elapsed before the commencement of this suit); and the defendant further saith, that the aforesaid taxation of the costs under the said order was afterwards, and after the making of the said agreement, and before the commencement of this suit, to wit, on the 8th day of April, 1841, and on divers other days and times between that day and the commencement of this suit, proceeded with in pursuance of the said order, and such taxation at the commencement of this suit was, without the default or laches of the defendant and the said R. G. Edwards, or either of them, and still is, pending and incomplete, and no allocatur was at the commencement of this suit given upon such taxation, nor has yet been given thereupon or thereunder, nor had it at the commencement of this suit nor has it hitherto been discovered or ascertained, or signified in any way whatsoever, whether any or what balance was or is due from the plaintiff to the said defendant and R. G. Edwards upon the taxation of the aforesaid costs under the aforesaid order, in respect of the said nineteen bills of fees, charges, and disbursements, or any of them, or in respect of the charges and items contained in them, or any or either of them; and the defendant further saith, that the defendant and the said R. G. Edwards respectively, always from the time of the date and making of the said agreement until the commencement of this suit, and hitherto, have been, and were and are ready and willing to permit and allow the application of the balance (if any) found due from the plaintiff to the said defendant and the said R. G. Edwards, upon the said taxation of the costs aforesaid, under the said order, in and towards payment of the said

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promissory note, and the amount thereof, with interest, as aforesaid; and that defendant and the said R. G. Edwards respectively, always from the time of the making of the said agreement until the said 20th day of November, in the said agreement mentioned, were ready and willing, upon the said taxation being completed, to secure the full amount or the balance of the said promissory note, with interest as aforesaid, by a judgment, payable as in the said agreement mentioned, according as, on such taxation being completed, a balance should or should not appear to be due from the plaintiff as aforesaid; and that defendant and the said R. G. Edwards respectively, always from the said 20th day of November, in the said agreement mentioned, until the 24th day of March, in the said agreement also mentioned, were ready and willing, upon the said taxation being completed, to secure the full amount or the balance of the said promissory note, with interest as aforesaid, according as, on the said taxation being completed, a balance should or should not appear to be due from the plaintiff as aforesaid, by a judgment, for £50 and interest thereon, payable immediately, and a moiety of the balance, and interest thereon, on the said 24th day of March, in the said agreement mentioned, and the remainder, with interest, on the 24th of June, in the said agreement also mentioned; and that the defendant and the said R. G. Edwards respectively, always from the said 24th day of March, in the said agreement mentioned, until the 24th day of June, in the said agreement also mentioned, were ready and willing, upon the said taxation being completed, to secure the full amount or the balance of the said promissory note, with interest as aforesaid, according as, on the said taxation being completed, a balance should or should not appear to be due from the plaintiff as aforesaid, by a judgment for £50, and interest thereon, and a moiety of the balance, and interest thereon, payable immediately, and the remainder, with interest, on the 24th day of June, in the said agreement

mentioned; and that defendant and the said R. G. Edwards always from the said 24th day of June, in the said agreement mentioned, until the commencement of this suit, and hitherto, have been, and were and are, ready and willing, upon the said taxation being completed, to secure the full amount or the balance of the said promissory note, with interest as aforesaid, according as, on such taxation being completed, a balance should or should not appear to be due to the said plaintiff as aforesaid, by a judgment for the full and whole amount thereof, payable immediately; and that defendant and the said R. G. Edwards have respectively always, from the making of the said agreement until the commencement of this suit, and hitherto, been ready and willing in all things on their part and behalf to perform and fulfil, and have in all things on their part and behalf performed and fulfilled, the said agreement, of all which the plaintiff during all that time had notice. Verification.

To this plea there was a general demurrer, on the ground that the matters therein alleged amounted to an accord only, without satisfaction, and that it confessed the cause of action in the first count, without shewing any thing in avoidance of it.

Butt, in support of the demurrer.—The plea is bad. If it is to be taken as a plea of accord and satisfaction, it is no answer, as it is mere accord without satisfaction, being only in part executed. If the agreement was by way of satisfaction, it should have been pleaded to have been given and received as such. The allegation of readiness and willingness does not help the plea, for that is not sufficient, and performance cannot be excused. In *Comyns' Digest*, tit. "Accord," B. 4, the rule is thus laid down:—"So, an accord must be executed, otherwise there will be no remedy for a non-performance; and therefore an accord to pay money in satisfaction is not good, if he only shews that he

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is ready to pay; but he ought to say that he has paid it: 1 Rol. 129, l. 25; R. 1, Leo. 19. Neither is part performance sufficient." Thus again, in Comyns' Digest, B. 3:—"So if he does not shew it to be perfectly executed, R. Dy. 75 b; 356 a; PL. Com. 5; 9 Co. 79 b. 2. As, if an accord be to do two things, and he shews only one of them performed: 1 Rol. 129, l. 12; 1 Rol. 471, l. 10; R. Cro. Car. 193; vide Dyer, 356 a. 3. So, if an accord was to pay money and an attorney's bill, and he shews that he had paid the money, and was ready to pay the bill, but never had it: R. Ray. 203; 1 Mod. 69; 2 Keb. 690. 4. To pay money, and to give counsel on request, and that he was not requested: Bro. Accord. 7." And an accord should be executed before the commencement of the suit (a).—He was then stopped by the Court.

Atherton, contra.—The plea is good. The agreement set up by the plea is not an *accord* within the rule which requires *satisfaction* to make the plea a good plea in bar. An accord, that is, an agreement, within this rule, must, by its terms, stipulate for *satisfaction*: and such an agreement unexecuted, without doubt, could not be pleaded. All the examples given in Comyns' Digest in illustration of this rule support this view. In every instance, the accord, if carried out, would terminate in satisfaction. It is, however, contended that the agreement here pleaded is founded on a good consideration, which is violated by bringing the present action. The plea, therefore, is good in bar, not by way of satisfaction, but in suspension of the suit. Com. Dig. Accord, (B. 4), 5; *Allen v. Harris* (b). The plea discloses a good consideration, as it must have been contemplated by the parties that the taxation would be completed, the plea therefore is a good plea in bar. It is an agreement which does by necessary implication suspend the remedy,

(a) Com. Dig., Accord, (B. 4), 5.

(b) Ld. Raym. 122.

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and goes in bar of the action. The plea is good in form, and shews that the action has been brought too soon. In *Tracy v. The Bank of England* (a), certain stock of the plaintiffs was transferred under a forged power of attorney. The Bank of England offered to replace the stock, if the plaintiffs would first prove the amount under a commission of bankruptcy issued against a firm in which the forger of the power had been a partner; after this offer, the plaintiffs received a dividend, and engaged to tender a proof of their demand under the commission of bankruptcy; and it was there held, that the plaintiffs could not sue the Bank in respect of the stock, till they had fulfilled their engagement to tender the proof under the commission of bankruptcy. In that case it was held that the defence to the action was good, first, on the ground that the action was brought against good faith, and secondly, that the defendants had a right to avail themselves of the agreement to prevent circuity of action. [*Alderson, B.*—There the act was to have been done by the plaintiffs.] The case of *Tatlock v. Smith* (b) is of a similar nature. *Simon v. Lloyd* (c) was an action for goods sold &c. The defendant pleaded, as to 9*l.* 15*s.* 9½*d.*, that, after the making of the promise, and before the commencement of the suit, the defendant, at the plaintiff's request, drew upon a piece of paper having a bill of exchange stamp upon it of 1*s.* 6*d.*, an instrument purporting to be a bill of exchange, without a drawer's name thereto, whereby the defendant was required to pay to such person or his order, who should place his name thereto as drawer, £20 two months after date, as for value received; which instrument the plaintiff requested the defendant to accept towards payment and satisfaction of the said sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's accommodation as to the rest; and which the defendant accepted accordingly, and delivered to the plaintiff, and thereby

(a) 6 Bing. 754. (b) 6 Bing. 339. (c) 2 C., M., & R. 187.

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became liable to the plaintiff, or to such person as should place his name thereto as drawer, or his order, the sum of £20, viz. towards payment of the sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's accommodation as to the rest; and that the plaintiff accepted and received the bill in satisfaction of the sum of 9*l.* 15*s.* 9½*d.*, and which bill was not due at the commencement of the suit. It was held, on demurrer to the replication, that as the bill remained unnegotiated in the hands of the plaintiff without any drawer's name to it, and unpaid, under the circumstances alleged in the plea, the plaintiff's right to sue on the original debt was suspended, until the expiration of two months and of the instrument's becoming due, and being dishonoured. *Parke, B.*, there says, "The defendant, by putting his name to this paper as the acceptor, entered into a promise to pay the bill, which he cannot now get rid of, and gave an irrevocable authority to put to it the name of any person as a drawer, by which he has rendered himself liable for the amount. That is a valuable consideration for an agreement by the plaintiff that his right to sue should be suspended. It is, in effect, an agreement not to sue for a certain time, in consideration of receiving an authority to use the defendant's name for a certain amount, during the period of two months." [*Alderson, B.*—Granting that it is a good agreement to suspend the remedy, the question is, whether the lapse of time has not made the performance of it impossible. The judgment cannot be signed now.] The defendant has always been ready and willing to perform his part of the agreement.

PER CURIAM.—The plea is bad, and there must be judgment for the plaintiff.

Judgment for the plaintiff (a).

(a) See *Gifford v. Whittaker*, 15 L. J., N. S., Q. B., 160; *Bailey* 6 Q. B. 249; *Griffiths v. Owen*, v. *Homan*, 3 Bing. N. C. 920; 13 M. & W. 58; *Bailie v. Moore*, *Harris v. Reynolds*, 7 Q. B. 71.

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BOUSFIELD v. EDGE.

June 8.

THIS was a rule calling on the plaintiff to shew cause why the interlocutory judgment signed herein should not be set aside for irregularity. The declaration contained a count by indorsee against indorser of a bill of exchange, and also a count for money due on an account stated. The defendant, who was under terms of pleading issuably, pleaded as follows:—"And the said defendant by — his attorney says, that he the defendant did not indorse the said bill, in manner and form as in the said first count mentioned. And as to the last count of the said declaration, the defendant says, that he did not promise in manner and form," &c. The plaintiff signed judgment, on the ground that the first plea was a plea to the whole declaration, and therefore non-issuable. The present rule having been obtained to set aside that judgment,

To a declaration containing a count by indorsee against indorser of a bill of exchange, and a count on an account stated, the defendant, who was under terms of pleading issuably, pleaded thus:—"And the defendant, by &c., says, that he did not indorse the said bill in manner and form as in the first count mentioned; and as to the last count, that he did not promise." The plaintiff having signed judgment, on the ground that the first plea in terms applied to the whole declaration, and was therefore non-issuable, the Court set aside the judgment for irregularity.

Prentice shewed cause.—The first plea, not being in terms confined to the first count, must be taken as pleaded to the whole declaration: *Putney v. Swann* (a). But the plea affords no answer to the last count, and would be bad on special demurrer. A plea in form pleaded to the whole declaration, but applicable to one count only, is not a plea upon which the plaintiff could join issue, and go to trial upon the merits: *Parratt v. Goddard* (b). A defendant, under terms of pleading issuably, is bound to plead honestly to the whole declaration, and not so as to invite a demurrer, *Hughes v. Poole* (c); and if he plead "never indebted" to a declaration containing a count on a bill of exchange, and also a count for goods sold, the plaintiff may treat the plea as a nullity, and sign judgment: *Sewell v. Dale* (d). These

(a) 2 M. & W. 72.

(c) 6 Scott, N. R. 959.

(b) 9 M. & W. 458; 1 Dowl.

(d) 8 Dowl. P. C. 309.

P. C., N. S., 874.

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pleas are also objectionable, for not being in conformity with the rule to plead several matters, by which the defendant was allowed to plead to the first count only the plea denying the indorsement of the bill.

The Attorney-General and Thompson, contra.—The rule of Court, H. T., 4 Will. 4, pl. 9, has dispensed with the formal commencement of pleas; and though this first plea is general in its commencement, yet the conclusion of it shews that it is pleaded to the first count only, for it traverses the indorsement “in manner and form as in the first count mentioned.” In *Vere v Goldsborough* (a) it was held, that the informality of omitting to confine each plea to the particular count to which it applied, did not authorize the plaintiff to sign judgment. It is true, that in that case the defendant does not appear to have been under terms of pleading issuably; but it is submitted that makes no difference. In the cases cited on the other side, it will be found, that unless the pleas went to the whole declaration, there would have been part of the declaration unanswered, and upon which the plaintiff would have been entitled to sign judgment. *Worley v. Harrison* (b) shews that the informality, if any, in the plea is only ground of special demurrer.

PER CURIAM (c).—The rule must be absolute. How can it be said that a plea, which is only bad on special demurrer, is not a plea to the merits?

Rule absolute.

(a) 1 Bing. N. C. 353.

(b) 3 Adol. & E. 669.

(c) *Pollock, C. B., Alderson, B.*

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The ATTORNEY-GENERAL v. HITCHCOCK.

June 8 & 10.

THIS was an information at the suit of the Attorney-General, which charged the defendant, a maltster, with having used a certain cistern for making malt, without having previously entered it, as required by the statute 4 & 5 Will. 4, c. 51, s. 6.

At the trial, before *Pollock*, C. B., at the sittings after last Easter Term, a witness of the name of Spooner, who deposed to the fact of the cistern having been used by the defendant, was asked, on cross-examination by the defendant's counsel, whether he had not said that the officers of the Crown had offered him £20 to say that the cistern had been used. Spooner denied having said so, and thereupon the defendant's counsel proposed to ask another witness of the name of Cook, whether Spooner had not said so. The *Attorney-General* objected to this question, and the Lord Chief Baron, being of opinion that the question was irrelevant to the issue, and that it also tended to raise a collateral issue, held the objection good, and ruled that it could not be put.

In an information under the revenue laws, a witness, who had given material evidence as to the fact in issue, was asked, on cross-examination, whether he had not said that the officers of the Crown had offered him a bribe to give that evidence. He denied that he had ever said so:—*Held*, that evidence was inadmissible to shew that he had made such a statement.

Quere, as to the extent to which evidence is admissible, since 6 & 7 Vict. c. 85, for the purpose of affecting the credit of a witness.

Bovill obtained a rule for a new trial, on the ground that this evidence was improperly rejected, and cited *Meagoe v. Simmons* (a), and *Yewin's case* (b).

The Attorney-General (*J. Wilde* with him) shewed cause.—This is a very important question, and one which is not directly affected by any decided cases; for such as are applicable to it, which are mere *Nisi Prius* decisions, cannot be said to lay down any definite principle or fixed rule by which this case can be governed. The principle upon which it must depend is correctly laid down in *Phillipps on Evidence*, where it is stated that “it is a general

(a) 3 C. & P. 75.

(b) 2 Camp. 638, (n.)

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rule that a witness cannot be cross-examined as to any fact, which, if admitted, would be wholly collateral, and wholly irrelevant to the matters in issue, for the purpose of contradicting him by other evidence, and in this manner to discredit his testimony. And if the witness answer such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter. The point for consideration therefore is, what question, or what matter is wholly irrelevant?" (a) This is the correct rule, and the criterion of relevancy depends, as it is submitted, upon this,—Could the defendant substantially have proved, as a part of his own case, that the witness had said what was imputed to him by the question? In the consideration of this question, it may be convenient to divide the subject into the three following heads:—First, could the defendant substantially have proved that the witness had been bribed? Secondly, that the witness had been offered a bribe? and thirdly, that he had said he had been offered a bribe?—admitting that the use of the cistern, upon which the offer is dependent, is material evidence. If the first or second of these questions be answered in the negative, the answer to the last must necessarily be so likewise, although the decision of the last only is required. It will, however, be perhaps advantageous, as a preliminary step, to consider the first of these three divisions of the subject, as the reasons connected with it may dispose of the question before the Court. Could then the defendant substantially have proved that the witness had been bribed? Now the reasons upon which one of the questions in *The Queen's case* was answered by the judges, form a distinct authority to shew, that as between the Crown and the defendant, there can be no rule to make such evidence admissible for the purpose of disparaging the prosecution (b). There cannot be any person upon whom such

(a) 2 Phill. on Evid., 9th Ed., p. 398.

(b) 2 Brod. & B. 305

conduct can operate, as this is not a civil case, in which the acts of the individual party are binding on that party. One of the questions put by the House of Lords to the judges in *The Queen's case*, was as follows: "If, in a trial on an indictment for a capital offence or any crime, evidence had been given, upon the cross-examination of a witness examined in chief in support thereof, from which it appeared that A. B., not examined as a witness, had been employed by the party preferring the indictment, as an agent to procure and examine evidence and witnesses in support of the indictment, and the party indicted should propose in the course of the defence, to examine C. D. as a witness to prove that A. B. had offered a bribe to E. F. in order to induce him to give testimony touching the matter in the indictment (E. F. not being a witness examined in support of the indictment, or examined before it was proposed to examine C. D.), would the Court below, according to their usage and practice, allow C. D. to be examined for the purpose aforesaid, and could such witness, according to law, be so examined, if the counsel employed in support of the prosecution objected to such examination (a)?" And it was held, that the question could not be put for the purpose of disparaging the prosecution, by ultimately implicating any of the parties conducting it by the misconduct of the agent tendering the bribe.

Again, the proof of a witness having been bribed stands upon the same principle as the commission of a crime by him on some previous occasion, and if such a question is put to him on cross-examination, his answer must be taken for better or worse. [*Parke, B.*—The reason in such case is a sound one: we cannot enter into a collateral question as to the man's having committed a crime on some former occasion, one reason being, that it would lead to complicated issues and long inquiries; and another, that a party cannot be ex-

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pected to be prepared to defend the whole of the actions of his life. Neither of those cases applies to the case of receiving a bribe, nor to a man's having a direct influence in giving his evidence in a cause. It may be shewn that he acted through motives of malice, as every man who comes into the witness box must come prepared to shew that he gives his evidence from pure motives; and such evidence as shews he does not, would be admissible against him. He ought therefore to have an opportunity of explaining it; and one of the questions put in *The Queen's case* to the judges was, "whether, where a witness is called on the part of the plaintiff or prosecutor, and gives evidence against the defendant in such cause; and if after the cross-examination of such witness by the defendant's counsel, they discover that the witness so examined has corrupted or endeavoured to corrupt another person to give false testimony in such cause, the counsel for such defendant may not be permitted to give evidence of such corrupt act of such witness, without calling back such witness (a)." The misconduct of the witness was in having endeavoured to procure false witnesses, and the judges seemed to think that you might shew that, provided you gave the witness the opportunity of an explanation upon being asked the question.] The defendant, then, could not prove that the witness had been bribed for the purpose of disparaging him, and the only ground upon which he could have proved that he had been bribed, must be, that it operates in such a manner on his mind as to sway his evidence, and thereby to make it difficult to be relied upon. Upon this ground rests the decision of Mr. Justice *Lawrence* in the case of *Yewin* (b), where he allowed the prisoner to shew that the principal witness had said that he would be revenged of him, and fix him in Monmouth gaol, although the witness had denied that he had said so. Under this head will come one or two cases which

(a) 2 Brod. & B. 312.

(b) 2 Camp. 638, (n.)

will be referred to and relied on by the other side. In the case of *Thomas v. David* (a), which was an action on a promissory note, the execution of which by the defendant was the matter in dispute, *Coleridge, J.*, is reported to have held, that evidence was admissible for the purpose of shewing that the principal witness was the kept mistress of the plaintiff, although she had denied that fact. It is extremely doubtful whether that case can be supported, as it cannot be material whether the witness does or does not stand in such a relation to the plaintiff. [*Alderson, B.*—The question is, whether she had an influence. It shews the *status* of the witness. *Parke, B.*—It may become an important question under Lord *Denman's* new act, whether such questions are admissible or not. Some time since, and before that act, I consulted the judges on a case tried at York, on an indictment against a man for murder. One of the principal witnesses against him was alleged to be insane, a person who had previously been tried at the York assizes and acquitted on the ground of insanity. The question was, whether the evidence of that witness could be received. I consulted the judges upon it before going the circuit, knowing that the question would arise. They were of opinion that it ought to be tried on the *voir dire*, and evidence admitted on the part of the prisoner, to shew that the witness was insane. I so tried it, and should have admitted the evidence, had not the jury said they did not believe the witness in the least degree.] If then the evidence that the witness had been offered a bribe is admissible, it can only be so on the ground that the jury might entertain some feeling against him, as being such a person as the prosecution had considered to be open to temptation. That is the only ground upon which the evidence can be admissible. The mere fact of a person's being open to temptation cannot affect his evidence. It is a purely collateral matter. But he has also

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sworn that he never made such a statement as that imputed to him.—He was then stopped by the Court.

Bovill, in support of the rule.—The evidence was improperly rejected. It was admissible to show the motives of the witness, and also to contradict his statements made upon oath, and thereby to shew that he was guilty of perjury. A witness may be contradicted on any matter, provided it be not collateral to the subject of inquiry, and this is the only limitation. The rule is correctly laid down in *Starkie on Evidence* (a), where it is expressed as follows:—“A witness is not to be cross-examined as to any distinct collateral fact, for the purpose of afterwards impeaching his testimony by contradicting him; for this would render an inquiry which ought to be simple, and confined to the matter in issue, intolerably complicated and prolix, by causing it to branch out into an indefinite number of collateral issues;” and the learned author, after referring to the case of *Spencely v. De Willot* (b), which was a penal action for usury, where the defendant’s counsel were not permitted to cross-examine as to other contracts made on the same days with other persons, in order to shew that the contracts in question were of the same nature, and not usurious, if the witness answered one way, or to contradict him if he answered the other,—proceeds thus:—“And should such questions be answered, evidence cannot afterwards be adduced for the purpose of contradiction. The same rule obtains, if a question as to a collateral fact be put to a witness for the purpose of discrediting his testimony; his answer must be taken as conclusive, and no evidence can afterwards be admitted. This rule *does not exclude the contradiction of the witness, as to any facts immediately connected with the subject of the inquiry.*” The author then cites the case of *Yewin*, and proceeds:—“In such a

(a) 1 Stark. Evid. 189.

(b) 7 East, 108.

case the inquiry is not collateral, but most important, in order to shew the motives and temper of the witness in the particular transaction" (a). There must, no doubt, be some connection with the particular matter of inquiry, in order to give the power of contradicting the witness. Here the question is sufficiently connected, both with reference to the motives which influence and act upon the mind of the witness, and as impeaching his testimony on a point which is materially connected with the inquiry. The question in dispute is the use of the cistern, and this person being a witness to prove the use of it, and being on his trial as to his veracity on that subject, every expression uttered by him, as to its use, is not collateral, but is most materially connected with the matter in dispute. It is submitted, therefore, that for these reasons the evidence should have been received. Upon these principles rest several cases. In *Meagoe v. Simmons* (b), the defence relied on was, that the bill upon which the action was brought had been usuriously discounted by the plaintiff. A witness was cross-examined as to something he had said at a previous trial, at which the action was between the same parties and upon a similar bill of exchange, alleged to have been discounted by the plaintiff at the same time, and Lord *Tenterden* permitted evidence to be given for the purpose of contradicting the statements of the witness. That was more collateral to the issue than the matter in the present case. [*Alderson*, B.—That was all the same transaction, as the two bills had been discounted at the same time.] In *Carpenter v. Wall* (c), which was an action for seducing the plaintiff's daughter, and getting her with child, the Court of Queen's Bench seemed to think, that the defendant might give evidence to shew that the daughter had said that a third person was the father of the child, if she had been asked, upon cross-examination, whether

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(a) 1 Stark. on Evid., 9th ed., 189.

(b) 3 C. & P. 75.

(c) 11 Ad. & E. 803.

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she had ever used such expressions. [*Pollock*, C. B.—The point in issue there was, whether the defendant was the seducer and father of the child.] In *Thomas v. David* (a), which has already been cited, *Coleridge*, J., said, “Is it not material to the issue whether the principal witness, who comes to support the plaintiff’s case, is his kept mistress?” In an indictment for rape, it is permitted to ask the prosecutrix whether she has had any previous connexion with the prisoner: *Rex v. Aspinall* (b). *Yewin’s case* is an authority to shew that the witness is interested by some motive which may influence his testimony. In *Lord Stafford’s case* (c), proof was admitted, on the part of the prisoner, that Dugdale, one of the witnesses for the prosecution, had endeavoured to suborn witnesses to give false evidence. [*Pollock*, C. B.—If it had been sought to inquire from the witness Spooner whether he had offered a bribe to another witness, the cases would have been parallel. *Alderson*, B.—You endeavour to fix the corrupt state of mind upon the person to whom the offer is made, and not upon him who makes the offer. The offer, without the acceptance, is nothing as regards the person to whom the offer is made.] It is not contended that the acceptance has any bearing on the present question.

POLLOCK, C. B.—I am of opinion that this rule should be discharged; and I may also add, that my Brother *Parke* expressed himself to be of that opinion before he left the Court (d). The question is, whether the witness Spooner, who had been asked if he had not said that the officer had offered him a bribe for the purpose of saying that the cistern had been used, and who stated that he had not said so, could be contradicted by asking the other witness, Cook, if Spooner

(a) 2 C. & P. 350.

(b) 2 Stark. on Evid. 392.

(c) 7 How. St. Tr. 1400.

(d) *Parke*, B., left the Court during *The Attorney-general’s* argument.

had not made that statement to him? The circumstance of Spooner being the only witness to prove that fact cannot affect the point, which must stand or fall by this general question, and by the answer to it, namely, on what occasions can evidence be admitted to contradict a witness, as to what he denies having said on cross-examination. I think, whether the answer be given in the terms used by me at the trial, or whether it be in effect as my Brother *Alderson* has put it in the course of the argument this morning, the result is the same. I have always understood,—and it is a matter on which I am not now expressing an opinion the result merely of the argument and consideration of to-day, and of the other day when the matter was before the Court, but the result of much consideration given to such questions during great experience in these matters, and with questions respecting the law of evidence,—my view, I say, has always been, that the test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence—if it have such a connection with the issue, that you would be allowed to give it in evidence—then it is a matter on which you may contradict him. Or it may be as well put, or perhaps better, in the language of my Brother *Alderson* this morning, that, if you ask a witness whether he has not said so and so, and the matter he is supposed to have said would, if he had said it, contradict any other part of his testimony, then you may call another witness to prove that he had said so, in order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he makes on oath in the witness-box is not true. As to the authorities cited by Mr. *Bovill*, with the greatest respect for the learned writers whose words he has quoted, I must say I think the expression, “as to any matters connected with the subject of inquiry,” is far too vague and loose to be the foundation of any judicial decision. And I may say, I am not at all

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prepared to adopt the proposition in those general terms—that a witness may be contradicted as to anything he denies having said, provided it be in any way connected with the subject before the jury. It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness's testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of inquiry. A distinction should be observed between those matters which may be given in evidence by way of contradiction, as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper, and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other. In the case cited, of *Thomas v. David*, on the witness being asked whether she was not connected in a particular manner with one of the parties, and having denied it, the learned judge permitted evidence to be given to shew that the connection which she swore had not existed, did in reality subsist. The object in doing so was, not to prove or disprove any part of her testimony, but the evidence was received on the same ground as it was in the case of *Ex parte Yewin*, where Mr. Justice Lawrence permitted evidence to be given to contradict a witness as to his having used expressions importing revenge. It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one, or that he would give such evidence as might dispose of the cause in one way or the other. If he denies that, you may give evidence as to what he has said, not with the view of having a

direct effect on the issue, but to shew what is the state of mind of that witness, in order that the jury may exercise their opinion as to how far he is to be believed. But those cases, where you may shew the condition of a witness, or his connection with either of the parties, are not to be confounded with other cases, where it is proposed to contradict a witness on some matter unconnected with the question at issue. And as to the latter class of cases, it appears to me that no instance has been cited by Mr. *Bovill* which amounts to an authority that you may contradict the witness on any matter that is not directly in issue before the Court. In this case it is admitted, that, with reference to the offering of a bribe, it could not originally have been proved that the offer of the bribe had been made to the witness to make a particular statement, the bribe not having been accepted by him. And the reason is, that it is totally irrelevant to the matter in issue, that some person should have thought fit to offer a bribe to the witness to give an untrue account of a transaction, and it is of no importance whatever, if that bribe was not accepted. It is no disparagement to a man that a bribe is offered to him: it may be a disparagement to the person who makes the offer. If, therefore, the witness is asked the fact, and denies it, or if he is asked whether he said so and so, and denies it, he cannot be contradicted as to what he has said. *Lord Stafford's case* was totally different. There the witness himself had been implicated in offering a bribe to some other person. That immediately affected him, as proving that he had acted the part of a suborner for the purpose of perverting the truth. In that case the evidence was to shew that the witness had offered a bribe in the particular case, and the object was to shew that he was so affected towards the party accused as to be willing to adopt any corrupt course in order to carry out his purpose. It seems to me that, under these circumstances, this evidence was properly excluded, and that therefore, this rule should be discharged.

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ALDERSON, B.—I am of the same opinion. It seems to me, that the rule may be thus laid down: A witness may be asked any question, which, if answered, would qualify or contradict some previous part of that witness's testimony, given on the trial of the issue; and if that question is so put to him, and answered, the opposite party may then contradict him: and for this simple reason, that the contradiction qualifies or contradicts the previous part of the witness's testimony, and so removes it. It is true the effect of the contradiction is somewhat beyond that, as tending to shew that no part of the witness's testimony can be relied on; but the effect would be the same if the question had been answered in the affirmative. Now the question is this, can you ask a witness as to what he is supposed to have said on a previous occasion? You may ask him as to any fact material to the issue, and if he denies it, you may prove that fact, as you are at liberty to prove any fact material to the issue; and in that case, though it may not be thought necessary to put the question previously to the witness, yet it would be but just to do so. The witness may also be asked as to his state of equal mind, or impartiality, between the two contending parties, questions which would have a tendency to show that the whole of his statement is to be taken with a qualification, and that such a statement ought really to be laid out of the case, for want of impartiality. In the case of *Ex parte Yewin*, it was held to be competent for the prisoner to shew that the witness had a spite against him. It was material to shew that the mind of the witness was not in a state of impartiality or equality towards the prisoner. The witness was asked the question in the first instance; but in that case I do not know that it might not have been proved independently of the question having been put to him, although, as I have before said, it is only just and reasonable that the question should be put. So, in the case before my Brother *Coleridge*, in which the woman who was called as a witness for the plaintiff was asked

whether she was not living with the plaintiff as his mistress. The tendency of the question was to shew that she stood in that peculiar relation to the plaintiff which the jury ought to know, in order that they might judge to what extent they could rely on the general character of her testimony as an impartial witness between the plaintiff and the defendant. The question had a bearing on the general status of the witness. Her answer might, therefore, be contradicted by other witnesses called for that purpose. Such, again, is the case of an offer of a bribe by a witness to another person, or the offer of a bribe accepted by a witness from another person: the circumstance of the witness having offered or accepted a bribe shews that he is not equal and impartial. So, in *Lord Stafford's case*, where the witness endeavoured to bribe another person to give evidence against Lord Stafford, that evidence was receivable, as having a tendency to shew that the man who came himself to give evidence against Lord Stafford, was embittered against him, and had endeavoured to persuade other people to give false evidence on the same side. That had a tendency to shew that the statement of the witness ought not to be relied upon by the jury. But, with these exceptions, I am not aware that you can with propriety permit a witness to be examined first, and contradicted afterwards, on a point which is merely and purely collateral, as for instance as to his personal character, and as to his having committed any particular act. The inadmissibility of such a contradiction depends, indeed, upon another principle altogether. Perhaps it ought to be received, but for the inconvenience that would arise from the witness being called upon to answer to particular acts of his life, which he might have been able to explain, if he had had reasonable notice to do so, and to have shewn that all the acts of his life had been perfectly correct and pure, although other witnesses were called to prove the contrary. The reason why a party is obliged to take the answer of a witness is, that if he were permitted to go into it, it is only

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justice to allow the witness to call other evidence in support of the testimony he has given, and as those witnesses might be cross-examined as to their conduct, such a course would be productive of endless collateral issues. Suppose, for instance, witness A. is accused of having committed some offence; witness B. is called to prove it, when, on witness B.'s cross-examination, he is asked whether he has not made some statement, to prove which witness C. is called, so that it would be necessary to try all those issues, before one step could be obtained towards the adjudication of the particular case before the Court. On the contrary, if the answer be taken as given, if the witness speaks falsely he may be indicted for perjury. That is the proper remedy. Then in the next place, in my opinion, when the question is not relevant, strictly speaking, to the issue, but tending to contradict the witness, his answer must be taken, although it tends to shew that he, in that particular instance, speaks falsely, and although it is not altogether immaterial to the matter in issue, for the sake of the general public convenience; for great inconvenience would follow from a continual course of those sorts of cross-examinations which would be let in in the case of a witness being called for the purposes of contradiction. I think those are the rules by which these cases have always been governed, and the application of which is easy and short. In this case the party is asked, have you not said A. B. offered you £20 to make a certain statement, which I agree is material in the cause. He says, no, I have not said any such thing. Is that material to the issue, or does it qualify or contradict anything that he had said before? What he had said before was, that the cistern was used; the offer of a bribe to make a statement to the contrary, if he had not accepted it, would not have had a different tendency. If he had said, that he had been offered a bribe, if he had answered in the affirmative, it would not in the slightest degree have disproved the matter. If it would not, it does not qualify or contradict that which he

had before stated; and I think that it is not allowable to call a witness to contradict him in that, which, if answered by him in the affirmative, would not have qualified or contradicted his statement.

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ROLFE, B.—I am of the same opinion. The laws of evidence on this subject, as to what ought and what ought not to be received, must be considered as founded on a sort of comparative consideration of the time to be occupied in examinations of this nature, and the time which it is practicable to bestow upon them. If we lived for a thousand years instead of about sixty or seventy, and every case were of sufficient importance, it might be possible, and perhaps proper, to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible. Therefore some line must be drawn, and I take it the established rule is, that you may contradict any portion of the testimony that is given in support or contradiction of the issue between the parties. That is clear. Then, undoubtedly, mankind have felt that, as facts are frequently to be proved by the testimony of men of suspicious character, you may inquire into the genuineness and truthfulness of the party who gives such testimony. And undoubtedly there is some rule as to what you can contradict in respect of such evidence, and what you cannot, although it is not very easy to reconcile the rule with any positive principle; and I conceive the rule which permits evidence to be given to contradict a person who is not actuated by any improper motives, may be taken to trench a little upon that which does not allow you to contradict him when he says, "I am not infamous." That is, however, the rule that is established, and may be adhered to. Then apply all these rules to the

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case before us. The witness is asked, "Have you not received a bribe?" "I have not." "Have you never said you had?" "I never said so." "Have you never said you have been offered a bribe?" "I never did." Then it is proposed to contradict the witness by shewing, not that he had received a bribe,—not that he had said that he had received a bribe,—(which might have had a bearing on the bias of his mind),—but by shewing that, on some occasion, he had said he had been offered a bribe. If that were to be allowed, as my Brother *Alderson* has pointed out, endless inquiries might be entered into. It has not the smallest bearing on earth on the question as to the credibility of his testimony, as even the offer would be nothing if rejected; therefore I think it had no bearing on the subject of inquiry, and was very properly rejected. No one, indeed, can shut his eyes to this fact, that the real motive for asking the question was, not to disparage that witness, but to discredit some other persons who were to be dragged into it, as being supposed to be the persons who offered the bribe. I do not go into that at any greater length; but, in my opinion, the evidence was properly rejected, as tending to contradict the witness on a matter that was utterly irrelevant to the point in issue.

I am, therefore, of the same opinion with the rest of the Court, that this rule ought to be discharged.

Rule discharged.

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WASHBOURN v. BURROWS.

June 12.

COVENANT on an indenture for payment of £250, and interest, on demand.

The defendant pleaded (amongst other pleas), thirdly, that, before the making of the indenture, it was corruptly and against the form of the statute agreed by and between the plaintiff, W. B. Cliffe, and the defendant, that the plaintiff should lend and advance to W. B. Cliffe and the defendant the sum of £200, and that the plaintiff should forbear and give day of payment thereof to the said W. B. Cliffe and the defendant until demand of repayment thereof by the plaintiff; and that, upon such demand of repayment thereof, W. B. Cliffe and the defendant should then, for the loan of the said sum of £200, and for giving the day of payment thereof, give and pay to the plaintiff more than lawful interest at and after the rate of £5 per cent. per annum on the said sum of £200, that is to say, the sum of £50, making, together with the sum of £200 so to be lent and

Covenant for payment of £250 and interest on demand. The defendant pleaded, that the covenant was entered into in pursuance of an usurious contract, by which the defendant agreed to pay more than £5 per cent. by way of interest, and that the payment was secured by a deed, whereby the defendant bargained and sold to the plaintiff, by way of security, certain personal chattels, and also

"the crops of grass then growing on certain lands."

Replication, that the contract was entered into after the passing of the 2 & 3 Vict. c. 37:—*Held*, on general demurrer, that the plea was good, and the replication bad; for though the term "crops of growing grass" might mean crops to be severed by the owner of the soil, and delivered as a personal chattel, yet the plea afforded a good *prima facie* answer to the action, it being sufficient for the defendant to shew that the contract was usurious within the 12 Anne, s. 2, c. 16; and if the plaintiff relied upon the 2 & 3 Vict. c. 37, as excepting the case from the operation of that act, he should reply, that the contract was entered into after the passing of the statute of Victoria, and that the security did not relate to land.

The defendant pleaded also a general plea of fraud, to which the plaintiff replied *de injuria*:—*Held*, a good replication.

Another plea set out a power of sale in default of payment of £250, and interest, and averred that, in pursuance thereof, the plaintiff sold and disposed of the goods, chattels, and effects, in the indenture mentioned, for the purpose of repaying, satisfying, and discharging the £250, interest, and costs; and the plaintiff, by means of such sale and disposal, had and received £300, being the proceeds and profits of the sale and disposal, and thereby and therewith repaid, satisfied, and discharged, the sum of £250, interest, and costs. And the plaintiff, with the consent of the defendant, received the said proceeds and profits of the sale and disposal, in full satisfaction of the said sum of £250, interest and damages.

Replication, that the plaintiff did not sell or dispose of the said several goods, chattels, and effects, nor did the plaintiff, by means of such sale and disposal, have or receive the said monies, being the proceeds and profits of the said sale and disposal, nor did the plaintiff thereby or therewith repay, satisfy, or discharge the sum of £250, interest, &c., nor did the plaintiff accept or receive the said proceeds and profits of the sale and disposal in full satisfaction and discharge, *modo et formâ*:—*Held*, on special demurrer, that the replication was not bad for duplicity.

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advanced as aforesaid, the sum of £250 in the said indenture mentioned; and also that W. B. Cliffe and the defendant should pay to the plaintiff interest at the rate of £5 per cent. per annum on the said sum of £250, from the 31st day of May, 1845, until the payment of the sum of £250 in the said indenture mentioned; and that for securing the payment of the said sum of £250, with interest thereon as aforesaid, the said W. B. Cliffe and the defendant should make and seal, as their act and deed respectively, and deliver to the plaintiff a certain indenture, whereby the said W. B. Cliffe and the defendant should severally covenant with the plaintiff to pay him on demand the sum of £250, with interest thereon as aforesaid, and should also bargain, sell, and assign to the plaintiff all the goods, chattels, plate, linen, &c., then in and about and belonging to the dwelling-house and estate in the occupation of the said W. B. Cliffe and the defendant, called Rose Cottage, in the parish &c., and also *certain crops of grass then growing on the land* of a certain estate, called the sheeping-house estate, at Mathon, in the county of Hereford, *such goods, chattels, and effects*, to be severally and respectively enumerated in a certain schedule or inventory, to be annexed to the said indenture. (The plea then set out the proviso for making void the indenture on payment of the said sum of £250, with interest, and a power of sale in case of default in payment.) That in pursuance of the said corrupt and unlawful agreement, the plaintiff afterwards, to wit, on &c., lent and advanced to W. B. Cliffe and the defendant the sum of £200, and that for securing the repayment thereof, together with the said sum of £50, and interest after the rate aforesaid upon the said sum of £250, so to be paid and given to the plaintiff as aforesaid on demand, W. B. Cliffe and the defendant, in further pursuance of the said corrupt and unlawful agreement, then, to wit, on &c., made and sealed, and as their act and deed respectively delivered to the plaintiff, the indenture in the declaration mentioned,

whereby W. B. Cliffe and the defendant severally covenanted with the plaintiff as aforesaid for payment of the said sum of £250, and interest thereon at the rate aforesaid, and also bargained, sold, and assigned to the plaintiff the said goods, chattels, plate, linen, &c., and *the said crops of grass growing* hereinbefore mentioned, and which were severally enumerated in a schedule or inventory annexed to the said indenture, subject to such proviso, and upon the terms, and with the powers, and for the purposes, and in the manner aforesaid; and the plaintiff then accepted and received the said indenture, so made and containing the several matters aforesaid, of and from the said W. B. Cliffe and the defendant, in pursuance of the said corrupt and unlawful agreement, and for the purpose and on the terms aforesaid. The plea then averred, that the sum so agreed to be paid for interest exceeds £5 per cent., whereby, and by force of the said statute, the said indenture was and is wholly void in law. Verification.

Fourth plea, that the alleged indenture was obtained by fraud, covin, and misrepresentation.

The fifth plea set out the power of sale on default of payment of the sum of £250 and interest, and averred, that, after the non-payment thereof, the plaintiff sold and disposed of the several goods, chattels, and effects, in the said indenture mentioned, for the purpose of repaying, satisfying, and discharging the said sum of £250, and the interest then due thereon, and the costs, charges, and expenses in respect thereof. And the plaintiff thereby, and by means of the said sale and disposal, had and received a large sum, to wit, £500, being the proceeds and profits of the said sale and disposal, and thereby and therewith then repaid, satisfied, and discharged to him, the plaintiff, the said sum of £250, and all interest then due thereon, and all costs, &c.; and the plaintiff then, and with the consent of the defendant, accepted and received the said proceeds and profits of the said sale and disposal, to wit, the

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sum of £500, in full satisfaction and discharge, as well of the said sum of £250 and all interest due thereon, as of all damages sustained by the plaintiff by reason of the alleged breach of covenant. Verification.

Replication to third plea:—That the agreement in that plea mentioned was made, and the indenture in that plea mentioned was executed after the passing of the 2 & 3 Vict. c. 37, and whilst the said act was in force, to wit, on the 31st May, 1845. Verification.

To fourth plea, *de injuriâ*.

To fifth plea: That the plaintiff did not sell or dispose of the said several goods and chattels and effects, nor did the plaintiff, by means of such sale and disposal, have or receive the said monies, being the proceeds and profits of the said sale and disposal, nor did he the plaintiff thereby or therewith repay, satisfy, or discharge to him the plaintiff the said sum of £250, and all interest then due thereon, and all costs, &c., nor did the plaintiff accept or receive the said proceeds and profits of the said sale and disposal in such full satisfaction and discharge as in the said last plea mentioned, *modo et formâ*.

General demurrer to the replication to the third plea.

Special demurrer to the replication to the fourth plea, assigning for cause that the replication was inapplicable, inasmuch as that plea alleges matters which render the indenture null and void in law, and not merely matters in excuse for the non-performance of the covenants.

Special demurrer to the replication to the fifth plea, assigning for causes, that the same is double and multifarious, inasmuch as it attempts to put in issue the sale and disposal of the goods and chattels and effects in that plea mentioned, and also the receipt by the plaintiff of the proceeds and profits of the sale and disposal thereof, and also the plaintiff's defraying, satisfying, and discharging therewith the sum of £250, and interest, &c., and also the acceptance and receipt by the plaintiff of the proceeds and

profits of the sale and disposal, in full satisfaction and discharge.—Joinders in demurrer.

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Peacock, in support of the demurrers.—First, the plea discloses a usurious contract. The 2 & 3 Vict. c. 37, which in some respects repeals the usury laws, expressly provides “that nothing therein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein.” A contract for the sale of a crop of growing grass is a contract for the sale of an interest in land: *Crosby v. Wadsworth* (a): and growing fruit is an interest in land, and will pass to the heir and not to the executor: *Rodwell v. Phillips* (b). A distinction has indeed been taken between annual productions raised by the labour of man, and the annual productions of nature not referable to the industry of man, except at the period when they were first planted. But there is nothing on the face of this plea to show that the crop of growing grass was not the natural produce of the soil; if it comes within the description of “fructus industriales,” that is matter for replication. But even assuming that the plea does not shew that the money was secured upon an interest in land, it is nevertheless a good plea of usury. In *Thibault v. Gibson* (c) it was held, that the 2 & 3 Vict. c. 37, does not repeal the 12 Anne, stat. 2, c. 16, but only takes out of its operation all contracts made usurious by that statute, except such as relate to land, and therefore a count in a declaration for usury, in the general words of the statute of Anne, is good, without shewing that the contract was one affecting land. In like manner, it is sufficient for the defendant to shew an usurious contract within the statute of Anne. If the plaintiff relies upon the statute of Victoria, he should make it matter of replication.

(a) 6 East, 602. (b) 9 M. & W. 501. (c) 12 M. & W. 88.

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The replication de injuriâ is not admissible in answer to a plea of fraud. The plea does not set up matter of excuse, but shews that there never was any covenant, inasmuch as the deed was void ab initio. The case differs from that of a plea of fraud to an action on a bill of exchange, because the bill is not void as against third parties not cognizant of the fraud. Formerly, a plea of fraud commenced with "onerari non." [Alderson, B.—It is difficult to distinguish this case from *Couper v. Garbett* (a).] The replication de injuriâ is improper, when a plea amounts to a denial of the debt: *Pelly v. Rose* (b).

The replication to the fifth plea is bad for the grounds assigned. The plaintiff should have traversed either the sale of the property, or the payment of the debt. By putting both in issue, he compels the defendant to prove more than is necessary to afford an answer: *De Wolf v. Bevan* (c).

Gray, contrâ.—First, it is not shewn by the third plea that the loan was secured on an interest in land. The term "growing crops of grass" does not necessarily imply an interest in land. It may mean crops of grass which are not the natural produce of the land, and which would not pass to the heir, but to the executor, or it may mean crops of grass then growing, but to be afterwards cut and delivered as goods and chattels. [Alderson, B.—The case mentioned by Lord Abinger, in *Rodwell v. Phillips* (d), in which a contract to sell timber growing was held not to convey any interest in the land (e), is explained by what is said by Bayley, J., in his judgment in *Evans v. Roberts* (f); it was in fact a contract to sell timber as a chattel.] In the present case, the plea would be

(a) 13 M. & W. 34.

(b) 12 M. & W. 435.

(c) 13 M. & W. 160.

(d) 9 M. & W. 505.

(e) *Smith v. Surman*, 9 B. & C. 561.

(f) 5 B. & C. 829.

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satisfied by proof that the plaintiff had purchased the growing crop of grass on the terms that it was to be severed and delivered to him by the owner of the soil. In *Crosby v. Wadsworth* the question arose at Nisi Prius, and it was an ascertained fact that the contract was for the purchase of a growing crop of grass to be mown and made into hay by the vendee. That was clearly an interest in land, which would vest in the heir, and not in the executor. The cases cited have been decided on the Statute of Frauds(a), the language of which differs from the 2 & 3 Vict. c. 37. The former statute uses the words "interest in or concerning land;" and Lord *Ellenborough*, in his judgment in *Crosby v. Wadsworth*, adverts to those particular words. In *Evans v. Roberts*(b), *Littledale, J.*, says, "The words 'lands, tenements, and hereditaments,' appear to me to have been used by the legislature to denote a fee simple, and the words 'any interest in or concerning them' were used to denote a chattel interest, or some interest less than the fee simple." An interest concerning land is materially different from an interest in land; and it is probable that the legislature omitted the word "concerning" in the statute of Victoria, in order to meet cases like the present. *Graves v. Weld*(c) is an authority in favour of the position contended for. It is submitted, however, that the plea is bad. Greater strictness is required in a plea than in a declaration, and the plea should have alleged, either that the contract was made before the 2 & 3 Vict. c. 37, came into operation, or that it was excepted from the operation of that act: *Turquand v. Mosedon*(d).

With respect to the second point, the case of *Cowper v. Garbett* has expressly decided, that *de injuriâ* is a good replication to a plea of fraud. The circumstance of fraud does not render a deed absolutely void, but only voidable.

(a) 29 Car. 2, c. 3.

(c) 5 B. & Adol. 105.

(b) 5 B. & C. 829.

(d) 7 M. & W. 504.

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It is not like the case of a deed which is falsely read to an illiterate person: *Thoroughgood's case* (a). The title of a purchaser for a valuable consideration is valid, though he purchased of one who had obtained a conveyance by fraud: *Doe d. Bothell v. Martyr* (b). The meaning of the plea is, that there was such fraud as would avoid the deed as against the defendant.

As to the last point, the plaintiff might have traversed either the sale or payment, but he is not bound to do so. In the ordinary case of a plea of payment in satisfaction, the plaintiff may take issue either on the payment or the acceptance in satisfaction, but it is usual to traverse both: *Webb v. Weatherby* (c). In the case of *De Wolf v. Bevan* (d) the plea contained matter of title, and therefore came within the third resolution in *Crogate's case* (e).

Peacock replied.

Cur. adv. vult.

The judgment of the Court was delivered by

ROLFE, B.—This was an action of covenant, in which the plaintiff declared on a deed, whereby the defendant covenanted to pay the plaintiff £250, and interest.

To this the defendant pleaded several pleas; and the third plea was, that the covenant was entered into in pursuance of an usurious contract, by which the defendant agreed to pay more than £5 per cent. by way of interest, and that the payment was secured by a deed, whereby the defendant bargained and sold to the plaintiff, by way of security, certain personal chattels, and also the crops of grass then growing on certain lands mentioned in the deed, insisting,

(a) 2 Rep. 9.

(d) 13 M. & W. 160.

(b) 1 N. R. 332.

(e) 8 Rep. 132.

(c) 1 Scott, 477; 1 Bing. N. C. 502.

therefore, that the covenant was void under the statute of Anne.

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To this plea the plaintiff replied, that the contract was entered into after the passing of the statute 2 & 3 Vict. c. 37, and to this replication there was a general demurrer. The first question, therefore, is, whether the contract stated in the plea is void under the statute of Anne, notwithstanding the statute of Victoria. It certainly is void, if the plea sufficiently shews that the security consisted in part of an interest in land, for the statute of Victoria has no application to such securities. Now, part of the property assigned by way of security to the lender of the money, consisted of certain crops of grass, described in the deed as growing on a certain estate called the Sheeping-house estate, and it was argued, on the authority of *Crosby v. Wadsworth* (a), that this is an interest in land. When a sale of growing crops does, and when it does not, confer an interest in land, is often a question of much nicety; but certainly, when the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or fructus industriales, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land, and then deliver them to the purchaser, the purchaser acquires no interest in the soil, which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel. The doubt here is, what is the true meaning of the plea as to these crops. Mr. *Gray* argued that the plea would be satisfied by proving that the plaintiff, not being the owner of the Sheeping-house estate, was yet entitled to the grass in question, as having purchased it on the terms that it was to be severed by the owner of the soil, and then delivered to him as a mere personal chattel; and we are inclined to attach great weight to this argument, and think the case will be in the same position as if the plea had con-

(a) 6 East, 602.

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tained no reference to the subject-matter of the security, but had merely alleged that the covenant sued on was void, as having been entered into pursuant to an usurious contract for taking more than £5 per cent. interest. Such a contract would clearly be void under the statute of Anne, and that statute being still in force, the plea is *prima facie* a good answer to the plaintiff's demand, according to the principle laid down in *Thibault v. Gibson (a)*. The question then arises, whether the plaintiff gets rid of the effect of the statute of Anne, by merely stating that the contract was entered into after the passing of the statute of Victoria. We think he does not. The true effect of the statute of Victoria is to except from the operation of the statute of Anne all contracts not relating to land; and when the defendant has by his plea clearly brought the case within the operation of the old statute, it is not sufficient for the plaintiff to reply that which may or may not bring the contract within the operation of the statute of Victoria. It was incumbent on him to aver all which is necessary to shew that the statute of Anne does not apply to the question,—namely, that it was entered into after the passing of the statute of Victoria, and that it does not relate to land.

The replication does aver that the contract was after the statute of Victoria, but omits to aver that it does not relate to land. It therefore fails to shew what the plaintiff was bound to make out, namely, that the statute of Anne does not apply. On these grounds, therefore, even adopting Mr. *Gray's* argument, as we are inclined to do, that the plea does not shew affirmatively that the security did comprise an interest in land, still we think that the plea is good, and that the replication offers no sufficient answer. There must, therefore, be judgment for the defendant on the third plea.

(a) 12 M. & W. 88.

Two other questions were raised in the argument on the fourth and fifth pleas.

The fourth plea was a general plea of fraud, to which there was a replication of *de injuriâ*, and the defendant demurred to this replication as inapplicable to an action of covenant; but we were all of opinion at the time of the argument, and so stated, that there was no distinction in principle between this case and the case of a bill of exchange, as to which *de injuriâ* has been held to be a good replication to a plea of fraud like the present: *Cooper v. Garbett* (a).

In the fifth plea the defendant states, that pursuant to the provisions of the deed the plaintiff sold the property comprised in the security, and by means of the proceeds of the sale satisfied himself the amount of his debt. The replication traversed the sale and payment of the debt by means of the proceeds, and the defendant demurred to this for duplicity. But we are all of opinion that this is not double; the bar set up is, that the debt has been satisfied by sale of the mortgaged property, and by application of the proceeds in liquidation of the debt. This is, in truth, only a special plea of payment; and although several items go to make up the complex fact, yet it is in truth but one defence. Judgment therefore will be entered on these two last pleas for the plaintiff, and on the third plea for the defendant.

Judgment accordingly.

(a) 13 M. & W. 38.

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July 3.

Part payment of a debt will not take the case out of the Statute of Limitations, unless the payment be made under circumstances which warrant a jury in inferring a promise to pay the residue; therefore, where a party, on being applied to for interest, paid a sovereign, and said he owed the money, but would not pay it:—*Held*, that it was a question for the jury to say whether he intended to refuse payment, or merely spoke in jest.

ANN WAINMAN v. KYNMAN.

DEBT by payee against maker of a promissory note, dated the 23rd of November, 1837, for payment of £193, with interest, six months after notice. There was also a count for money lent, interest, and money due on an account stated.

The defendant pleaded (with other pleas) the Statute of Limitations.

At the trial, before *Pollock*, C. B., at the London sittings after last Hilary Term, it appeared that the action was brought to recover the sum of 242*l.* 11*s.*, being the amount of principal and interest due upon the promissory note set out in the first count of the declaration. For the purpose of taking the case out of the Statute of Limitations, the plaintiff called a witness of the name of Holiday, who stated that, “on the 23rd of June, 1846, he accompanied the plaintiff to the defendant’s house. The defendant asked the plaintiff what had brought her there. She said she wanted some interest money. The defendant said, that the plaintiff ought to have let him know; a sovereign was all he had. He then gave the plaintiff a sovereign. The defendant said he owed the money but he would not pay it. He also said that they had balanced in 1841, and there was then £15 due for interest money; that he had paid her £4 in April last, and that £1 made £5.”

On the part of the defendant, it was objected that the above evidence was not sufficient to take the case out of the Statute of Limitations, inasmuch as the part payment was accompanied with an expression that the defendant did not intend to pay the residue. The Lord Chief Baron told the jury, that the intention of the defendant was immaterial, and that the mere fact of part payment was of itself sufficient to take the case out of the statute. The jury having

found for the plaintiff, leave was reserved for the defendant to move to enter a nonsuit.

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Lush, having obtained a rule nisi to enter a nonsuit, or for a new trial on the ground of misdirection,

Watson and *Wordsworth* showed cause in Trinity Term, June 12th.—There was sufficient evidence to take the case out of the Statute of Limitations. The part payment was accompanied by an acknowledgment that £4 had been paid in the preceding April. [*Alderson*, B.—*Bayley v. Ashton* (a) and other cases have established, that the acknowledgment of payment must be in writing, signed by the party, or the fact of payment must be proved.] It is true, that, in *Willis v. Newham* (b), it was held that a verbal acknowledgment of payment was not sufficient to take the case out of the statute; but the principle involved in that decision is now under the consideration of the Exchequer Chamber. Part payment operates as a general acknowledgment of the debt, and the party saying that he would pay no more, does not limit or qualify the act. In *Tippets v. Heane* (c), *Parke*, B., says, “In order to take a case out of the Statute of Limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt; secondly, it must appear that the payment was made on account of the debt for which the action is brought. But the case must go further, for it is necessary, in the third place, to shew that the payment was made as part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admis-

(a) 12 Adol. & E. 493.

(b) 3 Y. & J. 521.

(c) 1 C. M. & R. 252.

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sion of any still existing debt." In the present case all those requisites have been complied with.

Lush, in support of the rule.—A part payment will not take a case out of the Statute of Limitations, unless it be expressly made as part payment in discharge of liability for a larger amount, and with the intention of admitting a liability to pay the residue. Prior to the case of *A'Court v. Cross* (a), it was supposed that the mere acknowledgment of a debt was a waiver of the statute, but that case decided that the acknowledgment must be such as to operate as a new promise. There, *Best*, C. J., says, "There are many cases from which it may be collected, that if there be anything said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment will not take a case out of the statute." It is for the jury to say *quo animo* the party makes the admission. The mere act of part payment does not of itself take the case out of the statute, but the payment must be made with a view to revive the debtor's liability. In the case of *Bateman v. Pinder* (b), the Court put part payment on the same footing as an acknowledgment. And where a party revives a debt by paying it into Court, but at the same time refuses to pay interest, such payment of the principal does not revive the claim for interest: *Collyer v. Willock* (c). So, where some items of account are barred by the statute, a part payment by the debtor, without appropriation to such items, will not take them out of the statute: *Mills v. Fowkes* (d). Those authorities shew that the part payment must be made with the intention of creating a new liability to pay the debt. The acknowledgment must be such as would authorise the

(a) 3 Bing. 329.

(c) 4 Bing. 313.

(b) 3 Q. B. 574; 2 G. & Dav. 790.

(d) 5 Bing. N. C. 455; 7 Scott, 444.

jury to imply from it a promise to pay, and that question should have been left to them: *Linsell v. Bonsor* (a).

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Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B.—In this case the Lord Chief Baron, in substance, directed the jury that the mere fact of part payment was of itself conclusive to take the case out of the Statute of Limitations. We think that direction was undoubtedly erroneous. In order to take the case out of the statute, the circumstances must be such as to warrant the jury in inferring a promise to pay. Here there were circumstances from which such a promise might possibly have been inferred; but we think they ought to have been laid before the jury, and that the mere fact of part payment does not necessarily take the case out of the statute. It might be that the words were spoken by the defendant in jest, and without any intention of refusing payment, but that is a question for the jury to determine. The rule will, therefore, be absolute for a new trial.

Rule absolute.

(a) 2 Bing. N. C. 241; 2 Scott, 399.

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June 12.

HARRIS v. WALL.

Assumpsit by indorsee against indorser of a bill of exchange, with counts for money lent, &c. Plea, infancy.

Replication, that defendant, after he became of age, by memorandum in writing, signed by him, ratified and confirmed the contracts and promises. Issue thereon. The defendant, after he became of age, wrote to the plaintiff the following letters:—"I should feel particularly obliged if you would arrange to keep the bills back for a little time, as my late brother's executors have lost their mother and only sister lately, and which prevents them from settling with you. The money will be shortly paid, say £2000."—"The bills drawn out by Mr. B. and me, and my acceptances, one for £1500 and the other for £500, due on the 1st January last, will most likely be settled shortly, and would have been settled before, had not a sudden accident occurred, which prevented their being paid."—"I beg to inform you that I have this day forwarded your letter to Messrs. H. I cannot tell you about what time they will be settled, as I have not the money myself, and, as I have told you before, I have left it entirely in their hands."—"I received your letter yesterday, and am sorry to find that you are not contented with the letter I gave you when you were at my house, some short time ago. I have heard from the Messrs. H. yesterday, and they said they had written to their agent in Dublin, to arrange the whole thing. I therefore beg that you will immediately see and inform Mr. L., who I have heard from this day, of it. It is not a bit of use writing these sort of letters, as payment will not be made any the sooner for them. What I tell you is perfectly correct, and the matter will be settled shortly:—"Held, that the letters were a ratification of the defendant's promise made during infancy.

Replication. That the defendant, before the commencement of the suit, to wit, on &c., attained his full age of twenty-one years, and that the defendant after he had so attained his age of twenty-one years, and before the commencement of this suit, to wit, on &c., by a certain memorandum in writing, then made and signed by him, ratified and confirmed the said contracts and promises in the declaration mentioned, and then promised the plaintiff to pay him the said several monies in the declaration mentioned. Verification.

ASSUMPSIT by indorsee against acceptor of a bill of exchange, dated the 29th March, 1845, for payment of £500 nine months after date. There were also counts for money lent, interest, &c.

The defendant pleaded (with other pleas) that at the time of the making of the promises in the declaration mentioned, he the defendant was an infant within the age of twenty-one years, to wit, of the age of twenty years. Verification.

Replication. That the defendant, before the commencement of the suit, to wit, on &c., attained his full age of twenty-one years, and that the defendant after he had so attained his age of twenty-one years, and before the commencement of this suit, to wit, on &c., by a certain memorandum in writing, then made and signed by him, ratified and confirmed the said contracts and promises in the declaration mentioned, and then promised the plaintiff to pay him the said several monies in the declaration mentioned. Verification.

The rejoinder traversed the replication in terms, upon which issue was joined.

The cause was tried before *Patteson, J.*, at the Warwick summer assizes, 1846, when a verdict was found for the

plaintiff. The money will be shortly paid, say £2000."—"The bills drawn out by Mr. B. and me, and my acceptances, one for £1500 and the other for £500, due on the 1st January last, will most likely be settled shortly, and would have been settled before, had not a sudden accident occurred, which prevented their being paid."—"I beg to inform you that I have this day forwarded your letter to Messrs. H. I cannot tell you about what time they will be settled, as I have not the money myself, and, as I have told you before, I have left it entirely in their hands."—"I received your letter yesterday, and am sorry to find that you are not contented with the letter I gave you when you were at my house, some short time ago. I have heard from the Messrs. H. yesterday, and they said they had written to their agent in Dublin, to arrange the whole thing. I therefore beg that you will immediately see and inform Mr. L., who I have heard from this day, of it. It is not a bit of use writing these sort of letters, as payment will not be made any the sooner for them. What I tell you is perfectly correct, and the matter will be settled shortly:—"Held, that the letters were a ratification of the defendant's promise made during infancy.

Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification.

plaintiff, subject to the opinion of the Court on the following case:—

The plaintiff is a jeweller residing at Dublin, and the defendant was, when the transaction hereinafter mentioned took place, an officer in Her Majesty's 16th regiment of foot.

The bill of exchange in the first count mentioned was drawn, accepted, and indorsed, as is alleged in that count; and at that time, viz. 29th March, 1845, the defendant was an infant under the age of twenty-one years, that is to say, of the age of twenty years. The defendant became of full age on the 10th of December, 1845, before the bill became due. The defendant after he became of age wrote to the plaintiff the following letter, which, though mentioned to bear date January 2nd, 1845, was in reality on the same day of the month in 1846.

“ Cross House, Powick, near Worcester,

“ Mr. Harris,

“ January 2nd, 1845.

“ I should feel particularly obliged, if you would arrange to keep the bills back for a little time, as my late brother's executors have lost their mother and only sister lately, and which prevents them from settling with you. The money will be shortly paid, say £2000. I have heard from Mr. Barnett this morning, and he tells me a Mr. Green has written to him for the money. Please arrange with him, and write to me by return.”

The executors of the defendant's brother referred to in the foregoing letter were the Messrs. Hall mentioned in the letter of the defendant hereinafter set out, dated 19th of January, 1846. The defendant's brother had died in February, 1845, and had left the defendant a considerable fortune, more than ample for the payment of £2000.

When the bills became due they were dishonoured, and the defendant shortly after wrote to the plaintiff the following letter:—

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"Powick, Worcestershire,

"6th Jan., 1845.

"The bills drawn out by Mr. M'Barnett and me, and my acceptances, one for £1500 and the other for £500, due on the 1st of January last, will most likely be settled shortly, and would have been settled before had not a sudden accident occurred which prevented their being paid."

In reply is a further application from the plaintiff for payment of the bills; the defendant also, after he became of age, wrote and sent to the plaintiff the following letter, also mis-dated as above.

"Cross House, Powick, Worcestershire,

"19th Jan., 1845.

Sir,—I beg to inform you that I have this day forwarded your letter to Messrs. Hall, and also the letters from Messrs. Green & M'Barnett. I cannot exactly tell you about what time they will be settled, as I have not the money myself, and as I have told you before I have left it entirely in their hands—Yours truly,

"G. A. E. WALL."

The defendant, after he became of age, wrote and sent to the plaintiff the following reply to a letter written to him by plaintiff, also mis-dated:—

"Cross House, Powick, Worcester,

"25th Jan., 1845. ,

"Sir,—I received your letter of yesterday, and am sorry to find that you are not contented with the letter I gave you when you were at my house some short time ago. I have heard from the Messrs. Hall yesterday, and they said they had written to their agents in Dublin to arrange the whole thing; I therefore beg you will immediately see and inform Mr. Lazarus, who I heard from this day, of it. It

is not a bit of use writing these sort of letters, as payment will not be made any the sooner for them. What I tell you is perfectly correct, and the matter will be settled shortly."

"Truly,

"G. A. E. WALL."

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It is agreed that the pleadings in this action shall be considered and referred to as part of this case.

The question for the opinion of the Court is, whether the above letters of the defendant, dated respectively the 2nd, 6th, 19th, and 25th of January, 1846, taken together, amount in point of law to a sufficient promise or ratification, after full age, of his contract, so as to establish plaintiff's replication to defendant's plea of infancy.

If the Court should be of that opinion, then a verdict shall be entered for the plaintiff on all the issues for £500, with interest and costs of suit; but if the Court shall be of a contrary opinion, then that a nonsuit shall be entered.

The case was argued, in last Easter Term, (May 3rd), by *Macaulay*, for the plaintiff.—The letters amount to a ratification of the promise. The first letter contains a recognition of the existence of the debt, accompanied with a distinct promise that the monies shall be shortly paid. The case resembles *Hartley v. Wharton* (a), where the plaintiff produced the following paper signed by the defendant: "I am sorry to give you so much trouble in calling, but I am not prepared for you, but will without neglect remit you in a short time,"—and that was held a sufficient ratification. [*Parke*, B.—Does not the letter import that the defendant would pay the debt, if he got the two thousand pounds?] In *Hunt v. Massey* (b), the defendant addressed the following letter to his guardian:—"I request you to pay Mr. Hunt £101 at your earliest

(a) 11 Adol. & E. 934.

(b) 5 B. & Adol. 902.

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convenience after the date of this letter, from the money left me by my grandfather, R. Andrews, Esq., for which I have given my bill,"—and the Court held that amounted to a ratification of the original promise to pay according to the tenor and effect of the bill of exchange, and might be declared on accordingly. The case of *Lobb v. Stanley* (a) arose upon the 6 Geo. 4, c. 16, s. 131, which has received the same construction as the 9 Geo. 4, c. 14, s. 5; there the defendant wrote as follows:—"Mr. Stanley begs to inform Messrs. Lobb & Co. that he will take an early opportunity of settling their account, but Mr. Stanley objects to give his bill,"—and that was held a sufficient promise in writing by the bankrupt to pay the debt. If the letters be read together, they amount to an absolute unconditional promise to pay.

Waddington, for the defendant.—There is no ratification or promise by the defendant. The plaintiff was bound to prove a promise corresponding with that alleged in the declaration, viz. to pay the bill according to its tenor and effect, and to pay the other monies on request. It is true that in *Williams v. Moor* (b) it was decided, that an account stated by an infant might be ratified by him after he became of age, but that proceeded on the ground that the ratification created a new contract. A mere acknowledgment after full age of a debt contracted during infancy does not amount to a promise or ratification. In the case of *Cohen v. Armstrong* (c), the replication to a plea of infancy omitted to allege that the defendant ratified and confirmed the promise after he became of age; and Lord *Ellenborough* says, "This form of replication, that the defendant ratified and confirmed the promise, is not according to the old form. I remember it used to be, formerly, that he promised after he became of age; and strictly speaking that is the more correct form,

(a) 5 Q. B. 574.

(b) 11 M. & W. 256.

(c) 1 M. & Sel. 724.

for no person ever ratifies in words his former promise, but he makes a new promise. To say that he ratified, is an artificial inference from the fact; it is not a ratification unless done *animo ratificandi*: whereas, it is in general only a new promise to pay. I think, however, this replication may be supported. Ratification and confirmation mean something more than merely repeating the promise, and the jury have found that the defendant has ratified.”

[*Parke, B.*—The 9 Geo. 4, c. 14, s. 5, appears to distinguish between “ratification” and “promise.”] In *Hunt v. Massey* (a), *Littledale, J.*, says, “The case might be different, if the defendant had become of age, and written the letter after the bill had become due, then, perhaps, he could not be said to have promised to pay according to the tenor and effect of the bill of exchange.” The first letter amounts only to an acknowledgment that some money was due which the plaintiff would shortly get out of a particular fund. In *Hartley v. Wharton* (b) there was a distinct promise by the defendant, that he himself would remit the money. So also in *Lobb v. Stanley* (c). Cases have arisen upon the Statute of Limitations, in which language similar to the present has been held insufficient to revive the debt. In *Tanner v. Smart* (d) the plaintiff proved the following acknowledgment by the defendant:—“I cannot pay the debt at present, but I will pay it as soon as I can,”—and that was held not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant’s ability to pay. In *Whippy v. Hillary* (e), the defendant wrote to the plaintiff as follows:—“I have hitherto deferred writing to you regarding your demand upon me in consequence of some family arrangements, through which I shall be enabled to discharge your account, and which were in progress, not having been completed. I have now the satisfaction to inform

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(a) 5 B. & Adol. 902.

(b) 11 Adol. & E. 934.

(c) 5 Q. B. 574.

(d) 6 B. & C. 603.

(e) 3 B. & Adol. 399.

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you, that an appointment of sufficient funds has been made for this purpose, of which H. Y., Esq., is one of the trustees, to which I have given in a statement of your account amounting to 98*l.* 8*s.* It will, however, be unavoidable that some time must elapse before the trustees can be in cash to make these payments, but I have Mr. Y.'s authority to refer you to him for any further information you may deem requisite on this subject ;"—and that was held insufficient, on the ground, that by the 6 Geo. 4, c. 14, s. 1, the acknowledgment in writing to bar the statute must be signed by the party chargeable thereby, and such letter did not charge the defendant. Those cases are stronger than the present, for this letter merely refers to the executors of the defendant's brother as persons who would shortly pay the money. The same principle is applicable to both cases, and in each there must be either a distinct promise to pay, or an acknowledgment from which a promise is to be inferred: *Morrell v. Frith* (a), *Cripps v. Davis* (b). The case of *Bird v. Gammon* (c) must be considered as overruled by *Hart v. Prendergast* (d). There *Parke, B.*, says, "There is no doubt of the principle of law applicable to these cases, since the decision in *Tanner v. Smart*, namely, that the plaintiff must either shew an unqualified acknowledgment of the debt, or, if he shew a promise to pay coupled with a condition, he must shew performance of the condition, so as in either case to fit the promise laid in the declaration, which is a promise to pay on request." These letters contain an acknowledgment of a debt, but nothing from which it can be inferred that the defendant intended to charge himself with the payment. *Routledge v. Ramsay* (e) is also in point.

Macaulay replied.

Cur. adv. vult.

(a) 3 M. & W. 402.

(d) 14 M. & W. 741.

(b) 12 M. & W. 159.

(e) 8 Adol. & E. 221.

(c) 3 Bing. N. C. 883; 5 Scott, 213.

The judgment of the Court was now delivered by

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ROLFE, B.—The question to be decided in this special case, which was argued last term, is, whether certain letters written by the defendant, after he had attained his age of twenty-one years, amounted to a ratification of his liability on a bill of exchange for £500, which he had accepted during his minority.

The defendant attained his majority on the 10th of December, 1845. Under the will of his late brother, he was entitled to more than £2000, then in the hands of Messrs. Hall, his brother's executors. The bill in question, which had been accepted by the defendant during his minority, became due on the 1st of January, 1846, and the letters which he wrote are as follows: [His Lordship read the letters.]

The question is, whether from all or any of these letters the Court can say that the defendant ratified the promise made during his infancy to pay the £500 bill. There is some difficulty in cases like the present in understanding clearly what is meant by a ratification. It is generally, as was remarked by Lord *Ellenborough* in *Cohen v. Armstrong* (a), more correct to say that the infant made a new promise after he came of age. "To say that he ratified it, is an artificial inference from the fact; it is not a ratification unless done *animo ratificandi*: whereas it is in general only a new promise to pay." But whatever difficulty may exist, the law clearly recognises ratification as something distinct from a new promise. Indeed, Lord *Tenterden's* act, 9 Geo. 4, c. 14, s. 5, which was cited in the argument before us, expressly makes a distinction between a new promise and the ratification, after majority, of the old promise made during infancy, in both cases requiring a written instrument signed by the party. The first step, therefore, to take towards a decision of this case is, to un-

(a) 1 M. & Sel. 724.

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derstand clearly what is meant by a ratification, as distinguished from a new promise. We are of opinion, (apart from Lord *Tenterden's* act), that any act or declaration which recognises the existence of the promise as binding is a ratification of it, as, in the case of agency, anything which recognises as binding an act done by an agent, or by a party who has acted as agent, is an adoption of it. Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has attained his majority amount to a ratification. Applying this test to the case now before us, we think it clear that there has been a ratification. There cannot, we think, be a doubt but that if the bill in question, instead of having been accepted by an infant, had been accepted by A. B. on behalf of the defendant, being an adult, the letters in question would have amounted to an adoption of the agency of A. B., and that the defendant would have been liable; and he must on the same grounds be liable in the present case. He, in truth, treats his own act during infancy as having been done on behalf of himself after his majority. Our decision is thus conformable to that of the Court of Queen's Bench, in *Hartley v. Wharton* (a), where, however, the letter of ratification was certainly stronger than the letters now before us. We should have had great difficulty in holding that the letters of the present defendant were such as to amount to another promise; but according to the meaning we have attributed to the word ratification, we think that the plaintiff has made out his ratification, and therefore is entitled to our judgment.

Judgment for the plaintiff.

(a) 11 Adol. & E. 934.

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CLARK v. NEWSAM and EDWARDS.

May 25.

TRESPASS for assaulting the plaintiff, and giving him into the custody of a police constable, and compelling him to go to a police station, and there imprisoning him, and then compelling him to go in custody to a police office, &c.

Pleas.—First, not guilty. Secondly, that before and at the time of the commission of the said alleged trespasses, the defendant Edwards was clerk to one J. W. Robins, a share-broker, and the defendant Newsam was then also employed in the business of J. W. Robins; that shortly before the commission of the said alleged trespasses, one E. Richards was indebted to J. W. Robins in a certain sum, to wit, 53*l.* 14*s.* 6*d.*, for and as the balance of the prices of certain shares and securities respectively bought and sold for the said E. Richards by the said J. W. Robins, as such share-broker, and for commission therefor due to him. That on the 22nd of April, 1846, and before the committing of the grievances, &c., the said E. Richards came to the counting-house of the said J. W. Robins, and delivered to the said Edwards a certain paper or document, purporting to be and to represent a scrip certificate of “fifty shares of and in a certain provisionally registered railway company, to wit, the Buckinghamshire Railway and Oxford and Bletchley Junction, and purporting to be an *accountable receipt* for money, to wit, for the sum of 2*l.* 2*s.* per share on the said shares, paid to the said company by the holder of the said scrip certificate, as a deposit on the said shares, and purporting to be signed in that behalf by the secretary of the said company, by order of the provisional committee of management of the company. And the said E. Richards then requested the defendant Edwards, as clerk to the said Robins, to sell the said scrip certificate, and retain the amount of the said balance out of the proceeds thereof, which the defendant Edwards accordingly did. That shortly afterwards, to wit,

A scrip certificate in a railway company is not an “accountable receipt,” nor an “acquittance or receipt,” within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10; therefore the forgery of such document is not a felony, but a misdemeanor only.

Where two persons are jointly sued for false imprisonment, one of whom has acted from improper motives, the damages ought not to be assessed with reference to the act and motives of the most guilty, or the most innocent party, but the true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass.

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on &c., the said E. Richards again called at the said counting-house or office of the said J. W. Robins, accompanied by the plaintiff, whom he then announced and introduced to one J. Barber, a clerk of the said J. W. Robins, as his friend Mr. Clark, and the said E. Richards then stated to the said J. Barber, in the presence and hearing of the plaintiff, that his friend Mr. Clark had some Buckinghamshire shares to sell, and that the plaintiff and the said E. Richards wished the defendant Edwards to sell them for the plaintiff; but that the plaintiff was a friend of him the said E. Richards, and that the said E. Richards therefore requested the defendant to charge only half commission, and that he the said E. Richards was desirous by this means of making some compensation in respect of the former transaction, (meaning the delay of payment of the balance aforesaid). That the plaintiff shortly afterwards returned to the office of the said J. W. Robins, and delivered to the defendant Edwards, for sale, a certain other paper or document purporting to be a scrip certificate of fifty other shares of and in the said company, and purporting also to be an *accountable receipt* for money, to wit, for the sum of 2*l.* 2*s.* per share on the said last-mentioned shares, paid to the said company by the holder of the last-mentioned scrip certificate, as a deposit on the said last-mentioned shares, and purporting to be signed in that behalf by the secretary of the said company, to wit, one W. Harding, by order of the provisional committee of management of the said company; and the defendant Edwards sold and disposed of the same forthwith, and paid the proceeds to the plaintiff upon the same day, (that is to say) by cheque drawn upon and directed to certain bankers in London, to wit, Messrs. Glyn & Co., and then delivered to the plaintiff. That afterwards, and before the committing &c., it was widely and notoriously reported in the City of London, and particularly in and about the Stock Exchange, and divers other places, then daily frequented by the plaintiff and the defendants, and the defendants were then credibly

informed and believed, and the fact was so, that divers large quantities of papers and documents feloniously forged by divers persons unknown, and purporting to be scrip certificates of divers large quantities of shares of and in the said company, of the like purport and effect as the scrip certificates herein aforesaid, and purporting to be signed in like manner, were or had been, by divers persons unknown, fraudulently and feloniously circulated and disposed of to divers persons in and about London and elsewhere; and in particular the defendants were informed and believed, and the fact was and is, that the two several papers or documents before mentioned, purporting to be scrip certificates of fifty and fifty shares respectively of and in the said railway company, were and *had been feloniously forged* by certain persons unknown. That after the defendants had so learned and ascertained that the said two papers or documents were such false, forged, and fraudulent documents as aforesaid, and before the committing &c., to wit, on &c., the said paper or document purporting to be scrip certificates of fifty shares in the said railway company, so sold by the defendant Edwards, for and on behalf of the plaintiff, was returned by the buyer thereof, to wit, J. S., to the defendant Edwards as a forged instrument; and the said J. S. then claimed to be repaid and reimbursed by the defendant Edwards in respect thereof, and the defendant Edwards then repaid to the said buyer the price of the same, together with a large quantity of money, to wit, £70, for the difference in the market price of such scrip certificates of and in the said company, upon that day, and upon the day of the said sale of the said pretended scrip certificates for the plaintiff; all which said premises were respectively well known to the defendant Newsam, as well as to the defendant Edwards; and thereupon the defendants sent for the plaintiff, and the plaintiff then came to the said counting-house of the said J. W. Robins, and was by the defendants then charged with having delivered a forged scrip certificate to them for sale, [the plea here set

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out the conversation which then took place.] Wherefore the defendant, having good and probable cause of suspicion, and vehemently and sincerely suspecting and believing the plaintiff to have been guilty of an offence punishable by law, to wit, the offence of uttering and disposing of the said paper or document purporting to be a scrip certificate of fifty shares in the said railway company so sold for and on behalf of the plaintiff as aforesaid, knowing the same to be forged, with intent to defraud certain persons, to wit, the persons associated together in the said provisionally registered railway company, gave the plaintiff in charge to one R. C., then being a police constable in and for the city of London, and then requested the said police constable to take the plaintiff into custody, and to carry and convey him before some of the justices assigned to keep the peace of our lady the Queen, within and for the city of London, &c. *quæ sunt eadem, &c.*—Verification.

Replication, *de injuriâ*.

At the trial, before the Lord Chief Baron, at the London Sittings after Michaelmas Term, 1846, it appeared that the plaintiff was a dealer in railway shares at the Hall of Commerce in Threadneedle-street, and the defendant Edwards was the clerk of Robins, a stockbroker. In the month of April, 1846, one E. Richards, who was an acquaintance of Edwards, came to the counting-house of Robins, accompanied by the plaintiff. Richards inquired for the defendant Edwards, and he not being within, another clerk named Barber came, to whom Richards introduced the plaintiff as his friend Mr. Clark, and stated that he had some Buckinghamshire scrip to sell, and that he wished Edwards to sell it. Richards added, that as Clark was a friend of his, he should request Edwards to charge only half commission. Richards and the plaintiff then left, and in the course of the same day the plaintiff returned alone, and saw Edwards, who undertook to sell the scrip. The plaintiff then delivered to Edwards the following document, purporting to be a scrip certificate of

fifty shares in "The Buckinghamshire Railway, and Oxford and Bletchley Junction Railway."

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"1845.

"Scrip.

"Buckinghamshire Railway, and Oxford and Bletchley Junction.

"Provisionally Registered.

"Capital £2,250,000, in shares of £20 each.

"Deposit, 2*l.* 2*s.* per share.

No. 101,801 to 101,850. The holder of this voucher is entitled to fifty shares in the above undertaking, he having signed the subscribers' agreement and parliamentary contract, paid the deposit as above, and agreed to pay all calls in respect of the said shares.

"By order of the Provisional Committee of Management.

"W. HARDING, Secretary."

Edwards accordingly sold the scrip, and after deducting half the usual commission, paid to the plaintiff the proceeds of the sale by a check upon Messrs. Glynn & Co. It was afterwards found that the scrip was forged, and Edwards was compelled to refund the amount for which it was sold, and also to pay the difference in the market price of the genuine scrip, the same having risen in value. Shortly before this transaction Edwards had sold for Richards other scrip in the same railway, which also proved to be forged. The plaintiff was in consequence sent for by Edwards, and on his arrival at Robins's counting-house a conversation took place between the plaintiff and Edwards on the subject of these scrip certificates, and the plaintiff was asked to refund the money, which he stated his inability to do, and an agreement was drawn up by which he was to pay £10 down, deposit other shares as a security, and pay the residue within a certain time. The defendant Newsam

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then came into the counting-house, and upon hearing what had taken place, said that it was a matter which ought not to be compromised, and that a police officer should be sent for; a police officer was then called in, and the plaintiff was taken to the station house on a charge of feloniously uttering forged scrip. He was accompanied by both the defendants. At the station house the defendant Newsam refused to sign the charge-sheet, and it was signed by Edwards alone. From the station house the plaintiff was taken to Guildhall upon the same charge, and after examination remanded. He was subsequently brought up for re-examination at the Mansion House, when the magistrates thought that there was not sufficient evidence to warrant his detention, and he was discharged.

On the part of the plaintiff, it was objected that the plea was not proved, since a scrip certificate in a railway company was not an "accountable receipt" within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10. The defendant's counsel applied to amend the plea by substituting the words "acquittance or receipt." The learned Judge allowed the amendment, at the same time intimating his opinion that the document in question was not an "acquittance or receipt," and he directed the jury to assess contingent damages, in case the Court should be of opinion that the plea was not proved. The plaintiff's counsel, in his address to the jury, urged that the object of the defendant Edwards, in giving the plaintiff into custody, was to force him to pay the money which Edwards had been obliged to pay to the buyers of the scrip. He contended also, that though Newsam acted without any improper motive, the jury ought to assess the damage with reference to the act and motive of the most guilty party. The Lord Chief Baron told the jury, that in cases of joint assault it was usual to assess the damage as against the most guilty party; but when the question was as to the motives of the parties, the jury ought to act on a different principle, and

assess the damage according to the acts of the most innocent party. The jury having found a verdict for the plaintiff, with one farthing damages,

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Sir *F. Thesiger*, in Hilary Term, obtained a rule to shew cause why the verdict should not be set aside, and a new trial had; against which

Watson and *Greenwood* shewed cause.—The first question is, whether the forgery of this document is a felony or a misdemeanor. That depends upon whether it is “an acquittance or receipt for money,” within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10 (a). It is submitted that it is. Any document which imports that money has been paid, and which may be used as evidence of the receipt of money, is an “acquittance or receipt” within the meaning of that statute. The language of the 11 Geo. 4 & 1 Will. 4, c. 66, differs from that of the Stamp Act, 55 Geo. 3, c. 184, which imposes a duty on every “receipt or discharge given for or upon the payment of money.” The latter act has been construed to apply only to a receipt given in discharge of money antecedently due, and not to an acknowledgment of the deposit of money, to be accounted for: *Tomkins v. Ashby* (b). But the language of the former act is sufficient to embrace any document which states upon the face of

(a) Enacting, “that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any court roll, or copy of any court roll, relating to any copyhold or customary estate, or any acquittance or receipt, either for money or goods, or any accountable receipt either for money or goods, or any note,

bill, or other security for payment of money, or any warrant, order, or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money, with intent to defraud any person whatsoever, every such offender shall be guilty of felony,” &c.

(b) 6 B. & C. 541.

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it that money had been paid. There are two classes of receipts: the one, a formal statement of money having passed from one party to another; the other, an acknowledgment of the receipt of money to be accounted for. [*Alderson*, B.—This is clearly not an “accountable receipt,” neither is it “an acquittance or receipt.” It is merely a certificate that something has been done by some person which will entitle the holder of that document, at a future period, to shares in the company.] In *Rex v. Price* (a), it was held that a paper purporting to be a receipt, signed by the captain of a detachment, on the authority of which money is received from an army agent on account of the monthly subsistence for such detachment, was properly described as “a receipt for money” within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10. [*Pollock*, C. B.—That case is not distinguishable from the case of a shopman bringing a forged receipt to his master’s customer, and thereby getting the money. But this document has not the aspect of a receipt; it merely says that the bearer is entitled to shares, some person having paid some money. *Alderson*, B.—In the statute the word “acquittance” is found in connection with the word “receipt,” which means a receipt which acquits.] In *Regina v. Boardman* (b), the following document was held to be a “receipt;”—“6th January, 1840, 16*l.* 15*s.* 6*d.*—For the High Constable, James Hughes.” [*Alderson*, B.—That imports that money was received. Here the case might be different, if this were a certificate from the person who received the money.] In an action against the allottee of shares to recover the deposits, this document might be used as evidence of a receipt of the money by the company. [*Pollock*, C. B.—There is no doubt this document is merely a certificate for shares, and not a receipt.]

Secondly, it is said that the damages were assessed on a wrong principle, but that objection is not open to the

(a) 6 C. & P. 634.

(b) 2 Moo. & Rob. 147.

plaintiff. In the case of *Morrish v. Murrey* (a), where the judge at the trial ruled that a plea of justification was proved, and stated in the presence of counsel on both sides, who made no objection, that he should direct the jury to assess contingent damages, and should give the plaintiff leave to move to enter a verdict for the amount found by the jury, it was held that both parties were bound thereby, and that the plaintiff's counsel was not at liberty to move for a new trial for misdirection. [*Pollock*, C. B.—At the trial of this cause, the plaintiff's counsel insisted that the damages ought to be assessed as against the most guilty party. I thought that the one who acted bonâ fide was not answerable for the malice of the other.] The motives of the defendants ought not to be taken into consideration, and the quantum of damages is the injury sustained by the act of the least guilty party. Here the jury appear to have disposed of the case without reference in particular to the conduct of Edwards or Newsam; they thought the plaintiff entitled to a nominal compensation, and assessed the damages at one farthing.

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Sir *F. Theiger*, *Humfrey*, and *Innes* appeared to support the rule, but were not called upon.

POLLOCK, C. B.—The rule must be absolute for a new trial. The motives of neither party have any bearing on the case, but the plaintiff is entitled to compensation in proportion to the injury which he has received. Although at last the jury were told to take all the circumstances into consideration, yet it is very likely that they may have been misled by what passed at an earlier period, when I told them to consider the injury derived from the least guilty of the two defendants. It is difficult to say that there are no cases in which the motives of the parties would be

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important, still I think that it would be very unjust to make the malignant motive of one party a ground of aggravation of damage against the other party, who was altogether free from any improper motive. In such case the plaintiff ought to select the party against whom he means to get aggravated damages.

ALDERSON, B.—I am of the same opinion. In the case of a joint trespass, the true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass. We ought to look and see what each has done, and what injury has been sustained from each. Where two persons have a joint purpose, and thereby make themselves joint trespassers, and the one beats violently, and the other a little, the real injury is the aggregate of the injury received from both. So, if motive be taken into consideration, the motive of A. may be most aggravated, and the motive of B. most mitigated, then the damages must be regulated accordingly.

ROLFE, B.—When two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act.

PLATT, B., concurred.

Rule absolute.

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SANDERSON v. DOBSON.

June 9.

THIS was a special case sent by the Master of the Rolls for the opinion of this Court.

Thomas Stapylton, late of Leyburn, in the county of York, deceased, duly made, signed, and published his last will and testament in writing, bearing date the 4th day of October, 1808, and which was attested as by law was required for passing real estate by devise, and, so far as the same is material to be here stated, was in the words and figures following, that is to say: "Whereas I have lately contracted with Thomas Wray, of Agglethorp, in the parish of Coverham, in the said North Riding, yeoman, for the sale to him of my freehold messuages, tenements, or dwelling houses, situate at Middleham, in the said North Riding, with the appurtenances thereunto belonging, at or for the price or sum of £240, but have never made or executed any conveyance thereof to the said Thomas Wray; therefore I give and devise all the said tenements, messuages, or dwelling houses at Middleham aforesaid, unto and to the use of John Robson and Jonathan Sleigh, both of Leighbourn aforesaid, gentlemen, their heirs and assigns, in trust to enable them, on the receipt of the purchase money, or so much thereof as I have not already received, to convey and assure the same to the said Thomas Wray, his heirs and assigns, or as he or they shall direct or appoint; and the receipt of them, the said John Robson and Jonathan Sleigh, shall be a sufficient discharge to the said Thomas Wray, his heirs and assigns. And I give and devise all my leasehold estate, called Skelton Coat, with the rights and appurtenances thereunto belonging, situate, lying, and being near Bellerby, in the parish of Spennithorne, in the said North Riding, now in the tenure or occupation of Christopher Tidyman, unto my dear sisters Margery Stapylton and Martha Stapylton, of Patrick Brompton, in the said North Riding,

The word "*estate*" in a will does not of necessity include real property, but its meaning must be taken as explained by the context. Thus, where a testator, after devising certain real estates by his will, proceeded, "I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, *estate* and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my death," unto certain executors in trust, to dispose of the same as specified by the will:—*Held*, that the word "*estate*" did not pass real estate.

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spinsters, their heirs, executors, administrators, and assigns, for or during the term of their natural lives, or the lives of the several persons for whose lives the same are held, and the life of the longest liver of them (subject to the yearly rent payable thereout), without impeachment of waste; and from and after the death of either of my said sisters Margery Stapylton and Martha Stapylton without lawful issue, then I devise the whole of my said leasehold estate to the survivor of them, her heirs, executors, administrators, and assigns absolutely for ever. I give unto my said sisters my silver-hafted knives and forks and my silver table spoons, equally to be divided between them; and I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, *estate*, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my death, unto the said John Robson and Jonathan Sleigh, their executors, administrators, and assigns, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such sale arising, towards payment of my debts and the legacy hereinafter mentioned, and to pay the surplus, if any, to my said sisters Margery Stapylton and Martha Stapylton. I give and bequeath all my ready money, and the money arising by sale of my said premises at Middleham to be received by my said trustees, securities for money, and all other sum or sums of money that may be due and owing to me at the time of my decease, unto my said sisters and my brother Ralph Stapylton, of Leyburn aforesaid, esquire, to be divided equally share and share alike, thereout to pay my funeral expenses." And after various specific bequests of furniture and chattels, the will proceeded as follows: "I constitute my worthy and much esteemed friends, the said John Robson and Jonathan Sleigh, executors in trust of this my last will and testament; and I hereby request of them to pay the sum of two shillings apiece to every person in Leyburn, whom

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they may deem fit and proper objects of charity, which money I desire may be paid as soon after my decease as conveniently may be: and I give to them, the said John Robson and Jonathan Sleigh, the sum of ten guineas each, of which I beg their acceptance as small acknowledgments for the trouble they may have in the trusts and executorship of this my will: and I declare that they shall not be answerable the one for the other of them, nor for more money than they shall actually receive, and by no means for involuntary losses, and that they, their respective heirs, executors, administrators, and assigns, shall be allowed all their costs, charges, damages, and expenses to be occasioned by the execution of the trusts hereby in them reposed. And I do hereby revoke all my former wills."

The testator was, at the time of making his aforesaid will, and continued down to and at the time of his death, seised of a moiety of certain freehold messuages, lands, and hereditaments, situate at Leyburn, Bellerby, and Harnby, in the county of York, for an estate for his life, with contingent remainders (which failed), with the reversion to himself in fee simple.

The testator died on the 12th day of October, 1808, without having revoked or altered his said will.

The question for the Court is, whether, under the above stated will of Thomas Stapylton, the testator, any and what estate or interest in the hereditaments at Leyburn, Bellerby, and Harnby passed to John Robson and Jonathan Sleigh, the devisees in trust therein named.

The case was argued on the 31st of May, in the present term, by

Hodgson (with whom was *F. S. Williams*), for the plaintiff.—The question in the present case is, whether the real estate passed by the word "estate," in the following clause of the will:—"I give unto my said sisters my silver-hafted knives and forks, and my silver table spoons, to be

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equally divided between them; and I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, *goods, chattels, estate, and effects*, of what nature or kind soever, and wheresoever the same may be at the time of my death, unto the said John Robson and Jonathan Sleigh, their executors, administrators, and assigns, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such sale arising towards the payment of my debts and the legacy hereinafter mentioned, and to pay the surplus, if any, to my said sisters." It is contended on the part of the plaintiff, that by this word "estate" the real estate passed to the trustees. That word is capable of passing everything, and although there may be some difficulty arising from the circumstance of its being associated with the other words in the same clause, yet the Court ought to put the construction on the term which it is capable of receiving. In *Tilley v. Simpson* (a), the testator, after declaring that he intended to dispose of all his worldly estate, and after making several devises to different persons, gave and bequeathed all the rest and residue of his money, goods, chattels, and estate whatever to his nephew: and Lord *Hardwicke* held, that a beneficial interest in a real estate, not before disposed of, passed by this devise. [*Alderson*, B.—There the words are "estate *whatever*."] The case of *Jongsma v. Jongsma* (b) was decided in accordance with the preceding case, where also it was held, that the word "estates" would pass a copyhold which was surrendered to the use of the will: and *Tanner v. Morse* (c) is an authority that this word "estate" is sufficient to pass realty, although it be coupled with the word "temporal." Again, in *Hogan v. Jackson* (d), Lord *Mansfield* says, "It is now clearly settled, that the words "all his estate" will pass every-

(a) 2 T. R. 659, n.

(b) 1 Cox, 362.

(c) Cas. temp. Talb. 284.

(d) Cowp. 299.

thing a man has." These cases, it is submitted, establish the principle contended for, and several modern cases might be added, which are to the same effect. *Doe d. Evans v. Evans* (a) is not to be distinguished from the present case, and the words there are very similar to those in the present will. The words are, "I give and bequeath and devise to my wife all my money, securities for money, goods, chattels, and estate and effects, of what nature, or kind soever, and wheresoever the same may be at the time of my death." Lord *Denman*, in delivering the judgment of the Court, says, "And we think, adverting to the doctrine of Lord *Hardwicke* in *Tilley v. Simpson* (b), that of Lord *Kenyon* in *Jongsma v. Jongsma* (c), and the later cases, in which the principle has been acted upon as in those cases, that the realty does pass by the word "estate" in this will, the term used being capable of passing it, and the accompanying words being satisfied by reference to the personal property." That case is precisely in point. The absence of the word "heirs" in this sentence does not materially affect this view of the question: *Williams v. Thomas* (d). *Doe d. Hurrell v. Hurrell* (e) is no authority to the contrary. *Abbott*, C. J., there says, "The bequest is to them, their executors, administrators, and assigns; the word 'heirs' is not used; that circumstance is not indeed very strongly to be relied on, but is not altogether to be rejected in construing this will."—He also cited *Mostyn v. Champneys* (f), *Saumarez v. Saumarez* (g), and referred to *Jarman on Wills*, vol. i., p. 668.

Makins (with whom was *Fleming*), contra.—The question simply is, whether or not the real estate passed by this word "estate." It was not the intention of the testator to

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(a) 9 Ad. & Ell. 719.

(b) 2 T. R. 669, n.

(c) 1 Cox, 362.

(d) 12 East, 141.

(e) 5 B. & Ald. 18.

(f) 1 Bing. N. C. 341.

(g) 4 Myl. & Cr. 331.

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dispose of his real estate by this word. In a previous clause he specifically makes a disposition of his real estate; and it is evident that he was well acquainted with such technical terms as are proper for passing it. He there says, "*I give and devise*," which are appropriate words for passing real estate, and the word "devise" is not present in the clause in question. And, although it may be admitted that the word "estate" by itself would be sufficient to pass the real estate, yet in the present case, as all the other words with which it is associated are applicable to movable chattels only, and as the word "heirs" is also omitted, the word "estate" must be taken to mean things ejusdem generis, and therefore can have no application whatever to realty. The words "where-soever the same shall be at the time of my death," go to the whole clause, and clearly shew that the testator contemplated property of a changeable nature. These questions depend upon the intention of the testator. [*Pollock*, C. B.—In order to construe a will, the Court are entitled to know all the circumstances by which the testator was surrounded at the time the will was made.] In all the cases cited by the other side, it appeared to be the testator's clear intention to dispose of his real estate. In *Woollam v. Kenworthy* (a), it was held that, under the general word "estate," a real estate would not pass, if restrained by the intention collected from the whole will. In *Bebb v. Penoyre* (b), the testator, after giving several pecuniary bequests, proceeded: "I order the lease of my house, &c., to be sold, and all the rest and residue to be divided," &c.; and Lord *Ellenborough* there says, "The words 'rest and residue,' in the place in which they stand in this will, and so accompanied, must mean property of a similar nature to the lease of the house and furniture before mentioned, that is, his personal estate." Lord *Mansfield*, in *Roe d. Helling v. Yeud* (c), expressed his opinion, that the intention of the

(a) 9 Ves. 137.

(b) 11 East, 160.

(c) 2 N. R. 214.

testator must clearly appear to be that the real estate should pass, in order to establish the claim of the devisees against the heir-at-law. In *Jongsma v. Jongsma* (a), the will did not specifically dispose of the real estate; and, moreover, the word "estates" is more appropriate to realty than the word "estate." *Hogan v. Jackson* (b) is not an authority against the defendant; the words there used are "all the remainder and residue of all my effects, both real and personal." *Doe d. Evans v. Evans* (c) was not a case of real estate, but of chattels real. In *Tilley v. Simpson* (d), it clearly appeared to be the intention of the testator to dispose of all his real estate, which was a strong circumstance to induce the Court to give effect to the word there. In the construction of the will, the Court will look to the whole of the instrument: *Doe d. Haw v. Earles* (e); and from this word "estate" the position contended for by the other side cannot be supported.

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Hodgson was heard in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This case, which was sent by the Master of the Rolls for our opinion, was argued before us early in the present term, the point being as to the proper construction to be given to the word "estate" in the will of Thomas Stapylton. The passage on which the question turns is as follows:—"I give unto my said sisters my silver-hafted knives and forks, and my silver table-spoons, to be equally divided between them; and I give all the rest of my household furniture, books, linen, and china, (except as hereinafter mentioned), goods, chattels, 'estate,' and effects, of what

(a) 1 Cox, 362.

(d) 2 T. R. 659, n.

(b) 1 Cowp. 299.

(e) 15 M. & W. 450.

(c) 9 Ad. & Ell. 719.

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nature or kind soever, and wheresoever the same shall be at the time of my death, unto the said John Robson and Jonathan Sleigh, their executors, administrators, and assigns, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such sale arising towards the payment of my debts and the legacy herein-after mentioned, and to pay the surplus, if any, to my said sisters Margery and Martha." The testator, at the date of the will, was tenant for life of a real estate, and was also entitled to the ultimate reversion in fee of the same estate, subject to the several intermediate remainders vested in his brother and sister, and their issues, all of which, however, eventually failed. The plaintiff contended, that, under the gift, the testator's reversion in fee in the real estate passed to Robson and Sleigh, by force of the word "estate" contained in the clause which we have stated. The defendant, on the other hand, argued, that the word "estate," in the clause in question, has a limited sense, and does not extend to real estate at all, and so had no operation on the reversion. There is no doubt but that the word "estate," when used in a will, is sufficient to pass real as well as personal property. A devise of "my estate" or "estates," or "all my estate" or "estates," *primâ facie* carries all the deviser's property, real as well as personal; but this *primâ facie* meaning may be cut down or explained by the context; and one ground which was relied upon for contending that the word is not meant to include real property, was that it is associated with other words indicating personal property only. This distinction in such cases has been made, that where the other words are sufficient of themselves to include all the personal estate, then the word "estate" shall be deemed to refer to real estate, as it would otherwise have no operation. But if the other words would not include all the personal estate, but only a part of it, then the word "estate" has been taken to refer to personalty only, and to have been used for the purpose of completing

the otherwise imperfect enumeration of a testator's personal property. This was the principle propounded by Lord *Hardwicke*, in *Tilley v. Simpson*. Whether the doctrine thus laid down is altogether satisfactory, we need not now determine, for if in the present case the word "estate" does extend to real property, and so include the reversion in question, it must be because it is nomen generalissimum, comprehending everything real and personal over which the testator had a disposing power. It is difficult to imagine a case, in which the word "estate," by reason of its comprehensive character, would pass real property, but would not include all the personalty. Now it is plain that in this case the testator did not consider that he had used the word "estate" in any sense which would include all his personalty: for in the clause which follows next after the one in question, he disposes of an important part of his personal property, namely, his ready money, the money coming to him for the sale of the Middleton estate, and all monies due to him at his death; treating all these as something which he had not given by the previous clause. If, therefore, the word "estate," as here used, does not include all the personal estate, it is necessary to give it some more limited sense than that which would be its ordinary import, and this can only be done by applying the doctrine of *noscitur à sociis*, and holding that the word has reference exclusively to matters of the same nature as those with which it is associated, and so is merely in the nature of a tautologous repetition of the words "chattels" and "effects." On this ground we shall certify to the Master of the Rolls, that the trustees took no interest in the reversion in question.

It may be right to add, that there are two clauses in the will which appear to us strongly to confirm our view of the case. In the first place, the gift is to Robson and Sleight, their executors and administrators, and not to their heirs; and though no doubt a gift of real estate to trustees and their executors would be sufficient to carry the fee, yet the omission

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of the word "heirs" is certainly indicative of an intention to confine the operation of the clause to personal property: more especially as in the prior parts of the will, where he is devising his real estate at Middleton, the testator uses the appropriate language, and devises to the same trustees, "their heirs and assigns." The other observation which occurs to us, as shewing that the real estate was not contemplated, is the expression "wheresoever the same shall be at the time of my death." It is difficult to affix any rational meaning to these words, except on the assumption that the subject-matter of the gift was something the locality of which was or might be variable, and this can only be done by holding that the gift was confined to personal chattels, properly so called. We are however bound to add, that the force of this observation, to which at one time we were inclined to attach great weight, is much weakened by the fact that the same words occurred in *Doe d. Evans v. Evans*, but were not adverted to either by the counsel in argument, or by the Court in giving judgment, it having, we presume, been considered, either that the passage must be read *reddendo singula singulis*, and so the words, "wheresoever situate at my death," applied to such only of the matters enumerated as might change their situation, or else that the testator had in his contemplation future acquired real estate, erroneously supposing that his will would operate on such property. We have adverted to these last two points, but the ground on which we mainly rely is, that from the context it appears certain that the word "estate" was not meant to include all the personal estate, and therefore the principle on which the word is held to include real property, namely, the absolute generality of the expression, fails.

A certificate in accordance with the above opinion was afterwards sent to the Master of the Rolls.

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RULE and Another v. BRYDE and Another.

June 11.

IN this case there was a submission to arbitration, which, after reciting that "divers differences and disputes had arisen between the parties to the submission, and that an action at law had been commenced by the plaintiffs against the defendants to recover a certain claim," referred "the said action at law, and all other matters in difference between the said parties," to the award of three arbitrators, and it was thereby agreed that they should abide by the award of the said arbitrators, "of and concerning the said action, and also of and concerning all matters in difference between the said parties thereto." The costs of the action and all other expenses were to abide the event of the award.

The arbitrators awarded *generally* that the sum of 5*l.* 16*s.* 2*d.* was due from the defendants to the plaintiffs, and ordered the defendants to pay that sum to the plaintiffs. The costs were taxed by the Master on the higher scale.

An action, together with all matters in difference, were referred to arbitration. The arbitrators awarded *generally* that a certain sum was due from the defendants to the plaintiffs. The Court discharged a rule calling on the defendants to shew cause why they should not pay to the plaintiffs the sum so awarded.

Crompton had obtained a rule, calling on the defendants to shew cause why they should not pay to the plaintiffs the sum of 5*l.* 16*s.* 2*d.*, and also a certain sum for taxed costs.

T. Jones shewed cause.—The award is bad. The arbitrators have merely found that a certain sum is due to the plaintiffs, but have altogether omitted any mention of the action. In *Crosbie v. Holmes* (*a*), where a certain action was referred to an arbitrator, together with all matters in difference between the parties, and it was ordered that the costs of the action should abide the event of the award, and the costs of the reference and award should be in the discretion of the arbitrator, the arbitrator having ordered that the defendant

(*a*) 15 Law J., N. S., Q. B. 125.

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should pay the plaintiff a certain sum, and that the costs of the reference and award, and all other costs connected therewith, should be paid by the defendant, it was held that the award was bad, because it did not dispose of the action. *Williams, J.*, there says, "Now he awards a certain sum of money to be paid by the defendant to the plaintiff upon some account, but it is left in perfect uncertainty whether this sum is to be paid in respect of the matters in difference, or in respect of the action; and unless by this award the arbitrator has in effect decided what the result of that action is to be, and further has decided it in the plaintiff's favour, how are the costs, which are to abide the event of the award, to be given in favour of the successful party?" The sum may be due in respect of other matters. The award does not dispose of the action, and it is consistent with this finding that the plaintiff had no cause of action. *Pearson v. Archbold (a)* is also an authority in the defendants' favour, that this is no adjudication on the cause of action. These two cases are expressly in point.

Then there is also a difficulty as regards the question of costs. The costs of the action are to abide the event of the award. Upon what scale are they to be taxed? He referred to *Elleman v. Williams (b)*.

Crompton, in support of the rule.—The award is good, and does in reality dispose of the action: there would be no difficulty in pleading it, as the parties have agreed to abide by the award. The arbitrators were not bound to make mention of the costs: *Hemsworth v. Bryan (c)*. [*Alderson, B.*—There all the costs were to abide the result of the award, and as the arbitrator found a balance in favour of the plaintiff, he acted rightly in making no mention of costs.]

(a) 11 M. & W. 477. (b) 13 Law J., N. S., Q. B., 219.
(c) 1 C. B. 131.

POLLOCK, C. B.—I think that there is sufficient doubt in the present case to deter us from making the rule absolute. The agreement of submission recites, that “divers differences and disputes had arisen between the parties, and that a certain action had been commenced,” and then, by the agreement, the action, and all other matters in difference between the parties, are referred to certain arbitrators, by whose award they also agree to abide. It imports to my mind that some notice should have been taken of the action and of the other matters separately, and that they should not have been lumped together, as they are in the present award.

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ALDERSON, B., concurred.

ROLFE, B.—I entertain some doubt whether the award is not good, but as the matter is doubtful, I think we ought not to grant a rule.

PLATT, B.—I think that the parties intended to refer two matters to be awarded upon separately, and that that has not been done.

Rule discharged, without costs.

BAKER v. COE.

June 11.

GORDON moved for a distringas to compel an appearance. The affidavit stated, that several appointments had been made at the defendant's place of business, that his place of residence was unknown, and that the answers were, that the defendant was not within (a).

For a distringas to compel an appearance, it is sufficient if it appear that the calls were made at the defendant's place of business, if his residence is unknown.

Rule granted.

(a) See *Rock v. Hayward*, 15 Law J., N. S., C. P., 192.

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June 10.

GOLDSHEDE v. SWAN.

In an action on the following guarantee:—

“In consideration of your having this day advanced to our client Mr. V. D., £750, secured by his warrant of attorney, payable on the 22nd of August next, we hereby jointly and severally undertake to pay the same on default, &c. Dated the 20th of June, 1840:”—the declaration stated, that, in consideration that the plaintiff would, on the 22nd of June, 1840, lend to one V. D. £750, on the security of a warrant of attorney, payable on the 22nd of August then next, and would forbear and give time to V. D. until the 22nd of August, the defendant promised &c.:—

Held, that the instrument was sufficiently ambiguous to admit of evidence to shew that the advance was not a past one, but was made simultaneously with the execution of the guarantee, and that no amendment of the declaration was necessary.

ASSUMPSIT. The declaration stated, that theretofore (to wit) on the 22nd day of June, 1840, in consideration that the plaintiff, at the request of the defendant, would, on the said day, lend to one Vernon Dolphin a large sum of money (to wit) the sum of £750, on the security of the warrant of attorney of the said Vernon Dolphin, payable on the 22nd day of August then next, and would forbear and give time to the said Vernon Dolphin for the payment thereof, until the said 22nd day of August; the defendant promised the plaintiff to pay him the same sum of money on the said 22nd day of August aforesaid, or so soon thereafter as the plaintiff should apply for the same, in case default should be made in payment of the said sum of money by the said Vernon Dolphin on the said 22nd day of August. Averment, that the plaintiff, relying on the said promise of the defendant, did afterwards, on the said 22nd day of June, in the year aforesaid, lend the said Vernon Dolphin the said sum of money on the security of the warrant of attorney of the said Vernon Dolphin, payable on the 22nd day of August next after the making the said promise (to wit) on &c., and did forbear and give time to the said Vernon Dolphin for the payment thereof until the said 22nd day of August, which had elapsed before the commencement of the suit. Breach, non-payment by the defendant of that sum.

Plea, non assumpsit.

At the trial, before *Pollock*, C. B., at the Westminster sittings after last Hilary Term, the following guarantee was put in on the part of the plaintiff:—

“In consideration of your having this day advanced to our client, Mr. Vernon Dolphin of Piccadilly, in the

county of Middlesex, the sum of £750, secured by his warrant of attorney, payable on the 22nd day of August next, we hereby jointly and severally undertake to pay the same on the said 22nd day of August, or so soon afterwards as you apply for same, in case default should be made in payment of the sum of £750 by the said Vernon Dolphin, Esq., on the said 22nd day of August next. Dated this 22nd day of June, 1840.

"Yours, &c.,

"To Mr. W. G. Goldshede,
"95, Piccadilly."

"SWAN & MARTIN."

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It was thereupon objected by the defendant's counsel, that the guarantee was bad, as referring to a *past* consideration only, and that therefore no action could be founded upon it; and also, that inasmuch as the declaration alleged an executory consideration, there was a fatal variance. The Lord Chief Baron, however, was of opinion that the terms of the guarantee were sufficiently ambiguous to admit of explanation, and that in such case the declaration might be amended. The attesting witness proved, that the guarantee was signed and delivered by the defendant to the plaintiff simultaneously with the delivery of a cheque for the money to Dolphin, and that the guarantee had no reference whatever to a *past* consideration. The Lord Chief Baron thereupon directed a verdict to be entered for the plaintiff, but reserved leave to the defendant to enter a nonsuit, and to the plaintiff to amend the declaration, if the Court should be of opinion that it was necessary.

C. Jones, Serjt., having obtained a rule accordingly,

Watson and *Pearson* now shewed cause.—There are three questions in the present case; first, whether there is any variance between the declaration and the guarantee; secondly, whether any amendment of the declaration can now be

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made; and lastly, whether, if the amendment were made, the declaration would be good.

These questions depend alone upon the sufficiency of the guarantee. If that instrument should be considered to refer to a *past* consideration only, it is admitted that it is not good. The words are equivocal, and the circumstances of the whole transaction which occurred at the time the guarantee was executed were properly permitted to be given in evidence, to shew that the consideration was not a *past* consideration. Thus, in *Haigh v. Brooks* (a), it was held that there existed in the guarantee an ambiguity that might be explained by the evidence, so as to make the contract valid. The words there were, "in consideration of your being in advance." That case was affirmed in error from the Queen's Bench, and is strictly in point. *Butcher v. Stewart* (b) is also a parallel case; there the words of the guarantee were, "in consideration of your having released the above-named defendant from custody, I hereby engage," &c.; and it was held that this agreement might be read to be, as it really was, prospective. Again, in *Payne v. Wilson* (c), the declaration stated, that in consideration that the plaintiff, at the request of the defendant, would consent to suspend proceedings against A. on a cognovit, the defendant promised to pay £30 on account of the debt for which the cognovit was given, on the 1st of April then next; and it averred that the plaintiff did suspend proceedings on the cognovit accordingly. The plaintiff at the trial proved the following agreement in writing: "The plaintiff having, at my request, consented to suspend proceedings against A., I do hereby, in consideration thereof, personally promise to pay £30 on account of the debt, on the 1st day of April." It was objected that the considera-

(a) 10 Ad. & Ell. 309.

(b) 11 M. & W. 857.

(c) 7 B. & C. 423.

tion appeared by this document to have been executed, and not, as stated in the declaration, to be executory ; but it was held, that as the request must have preceded the consent to suspend the proceedings, the contract might be declared on as an executory contract, and that therefore the objection was not good. *Tanner v. Moore* (a) is also in favour of the plaintiff. Here the words "this day" may mean at a future period of this day, or at this time ; they are frequently used by many persons to mean "now." *Bowen v. Campbell* (b) is also in point. There the plaintiff having shipped goods to R. S., refused to deliver the bill of lading to him without a guarantee ; upon which the defendant enclosed a bill accepted by R. S., in a letter to the defendant, in which he stated that R. S. having accepted the bill, he gave his guarantee for the payment of it in case it should be dishonoured : and it was held, that the instrument sufficiently disclosed a consideration. *Pace v. Marsh* (c) is to the same effect. It is therefore submitted, that as the instrument is ambiguous, the explanation of its meaning was correctly admitted. Lastly, the amendment may be made. [PER CURIAM.—The amendment is clearly permissible, if the guarantee is good.]

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Pigott (with whom was *C. Jones*, Serjt.), in support of the rule.—The guarantee is not correctly set out in the declaration, and if this amendment were allowed, the defendant would be deprived of his right of demurrer.

The guarantee is, it is submitted, perfectly free from ambiguity ; there is nothing in it which is to be done by the plaintiff at a future period. This is, in effect, an application to the court to repeal the Statute of Frauds, which requires the consideration to appear upon the face of the written instrument. It is perfectly clear that this docu-

(a) 15 Law. J., N. S., Q. B., 391.

(b) 8 Taunt. 679.

(c) 1 Bing. 216.

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ment refers to a past event, and to that only. And parol evidence is not admissible to vary the terms of a written instrument. [*Parke, B.*— You cannot vary the terms of a written instrument by parol evidence; that is a regular rule; but if you can construe an instrument by parol evidence, where that instrument is ambiguous, in such a manner as not to contradict it, you are at liberty to do so.] The doctrine laid down in *Wain v. Walters* (a), that the consideration must appear upon the face of the instrument itself, was fully established by *Saunders v. Wakefield* (b), and has never since been disturbed. *Pace v. Marsh* (c) was decided on the authority of *Boehm v. Campbell* (d), and there cannot be much reliance placed on either of those cases, for in the latter of them the authority of *Wain v. Walters* was questioned. In *Payne v. Wilson* (e), the consideration was at the defendant's request. *Tanner v. Morse* (f) was the case of a continuing guarantee. In *Butcher v. Steuart* (g), the contract was held not to be within the Statute of Frauds.

The terms of the instrument must be such as to enable the Court, distinctly and with certainty, to gather from them what the consideration is. In *James v. Williams* (h) the following letter was held insufficient: "As you have a claim on my brother for 5*l.* 17*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day." And *Patteson, J.*, there says, "If any agreement not to sue the principal debtor is to be implied in this case, it ought to have been implied in *Wain v. Walters*; but there it was conceded, that the consideration did not appear on the face of the writing; and it was argued it need not appear. The plaintiff's counsel there did not

(a) 5 East, 10.

(b) 4 B. & Ad. 595.

(c) 8 Taunt. 679.

(d) 1 Bing. 216.

(e) 7 B. & C. 423.

(f) 5 B. & Ad. 1109.

(g) 11 M. & W. 857.

(h) 5 B. & Ad. 1109.

contend that it was necessarily to be implied from the promise of the surety to pay at a future time, that the consideration for so doing was forbearance towards the principal debtor in the mean time. And I am of opinion, that no inference is necessarily or fairly to be drawn from the terms of the guarantee in this case, that the consideration for the defendant's promise was forbearance for six weeks to the principal debtor." In *Bushell v. Beavan* (a), the guarantee was as follows:—"Whereas H. S. has hired your ship for six months from the 12th of July, 1830, and such longer time as his intended voyage may require, and has paid or secured the freight for six months from the 20th of August, 1830, and is about to leave England, I guarantee the payment of freight which shall accrue for any portion of the voyage after the said six months;" and the Court of Common Pleas, after consideration, held that no consideration was apparent on the face of this instrument, and that it was consequently bad. *Clancy v. Piggott* (b) and *Hawes v. Armstrong* (c) are to the same effect. It is therefore contended, that the guarantee is bad. In order to support it, it would be necessary to rely upon parol evidence, which is not admissible.

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POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. In the first place, I think that the Court has the power to make the amendment, if it be necessary, as it is a mere matter of form. No amendment, however, is necessary in the present case. The real question is, whether the evidence was admissible, that is, whether it might be shewn that the advance was not a past advance. It appears to me that the evidence was properly received. Where any written instrument is ambiguous, evidence is

(a) 1 Bing. N. C. 103.

(b) 2 Ad. & Ell. 473.

(c) 1 Bing. N. C. 761.

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receivable to construe its meaning, but not to alter or vary in any manner the terms of that instrument. Here it was proved, that the guarantee was given, and that the money was thereupon advanced. In the case of *Butcher v. Stuart*, the memorandum was held to be prospective, and judgment was given for the plaintiff. That case is very similar to the present. It was a special case, and was very recently decided. The present case also falls within the same principle as that of *Haigh v. Brooks*. The expression "this day" may mean something which *has been* done, or which is *to be* done this day. Evidence may therefore be properly admitted to explain its meaning, though not to contradict it. The words are not to have that grammatical strictness of construction put upon them for which the defendant's counsel contends; but such a one as will explain the meaning of the parties. For these reasons, and upon the authority of the cases of *Haigh v. Brooks* and *Butcher v. Stuart*, I am of opinion that the plaintiff is entitled to retain his verdict without any amendment, and that this rule should be discharged.

PARKE, B.—I am of the same opinion. I entertained some doubt at first, whether the consideration which appears on the face of this guarantee was sufficiently ambiguous to let in an explanation. But, on the authority of the cases of *Haigh v. Brooks* and *Butcher v. Stuart*, I think it is. I think that the evidence was properly admitted, not for the purpose of contradicting the instrument, but to explain the meaning of its terms. It was proved that no money had been advanced before the execution of the instrument; it must, therefore, be read as pointing to future advances: and there is nothing inconsistent or unnatural in this construction. Upon this ground the Queen's Bench proceeded in *Haigh v. Brooks*, and nobody can doubt, that, in that case, the memorandum might be read as referring to a past event. So, in *Butcher v. Stuart*, it was shewn that no release had been procured,

and the time was held to be a future one. *Butcher v. Steuart* was recognised in *Tanner v. Moore*. Now, reading this instrument with the facts given in evidence, there is nothing inconsistent with its being for a future event. I, however, found my opinion upon the cases of *Haigh v. Brooks* and *Butcher v. Steuart*. This declaration super-adds another term, viz. the forbearance, which the guarantee does not support. An amendment of the declaration in that particular may be made, if thought advisable.

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ALDERSON, B.—I am of the same opinion. I think that parol evidence, as in the case of a will, is admissible, not to alter or vary the meaning of this written instrument, but merely to explain the meaning of expressions contained in it. Thus, it has been permitted to shew, that by the custom of a particular district, the words “a thousand rabbits” mean 1200 rabbits. The words “your having this day advanced,” no advance having been made, shew that they do not refer to a past event. If the words had been “having advanced *yesterday*,” the evidence would not have been admissible, as it would have been a contradiction. In *Tanner v. Moore*, the Court adopted such a construction as explained the meaning of the parties. I think we should not adhere to the literal meaning of words to do injustice; but rather that we should permit the meaning of the parties to be shewn, that justice may thereby be done between them.

ROLFE, B.—The question is, whether the declaration is supported by the production of this guarantee. If that instrument really means something *done*, the plaintiff is not entitled to succeed. The question turns upon the meaning of the words “your having this day advanced,” which may mean, either, in consideration that you *have* this day advanced, or in consideration that you *shall have* this day advanced. The expression may mean either. How then

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are we to arrive at the real meaning? The cases of *Haigh v. Brooks* and *Butcher v. Stewart* decide that parol evidence is admissible for the purpose of explanation. These cases are in point. The expression here is equivocal.

Rule discharged.

June 2.

JUDSON v. BOWDEN.

COVENANT. The declaration stated, that by a certain indenture made on the 4th of March, 1845, between the plaintiff and the defendant, (profert), the plaintiff and defendant did covenant and agree with each other in manner following, that is to say, that the plaintiff and the defendant would be and become partners in the profession or business of surgeons and apothecaries, for the term of one year, to be commenced and be computed from the 1st of January, 1845, if the plaintiff and defendant should so long live; that the partnership should be carried on at the house situate at Water Row, Ware, in the county of Hertford, then in the occupation of the plaintiff, under the style or firm of "Judson and Bowden," to be printed or engraved or otherwise conspicuously posted and published on the principal outer door of the said house, and upon, under, and subject to the terms, conditions, and agreements following, that is to say, that the defendant should pay, and he did thereby covenant to pay, to the plaintiff the sum of £800, at the times and in manner thereafter mentioned, viz. the sum

Covenant. Declaration, after stating that plaintiff and defendant had agreed to enter into partnership as surgeons and apothecaries, until January 1, 1846, defendant agreeing to pay plaintiff £800, and to be entitled to all the profits of the business, &c., proceeded to state, that it was agreed that plaintiff should after the 1st of January introduce defendant as his successor in the business, and use his best endeavours to establish him in it, and defendant in consideration thereof covenanted to pay plaintiff the further sum of £50 on the 25th of March, 1846, in addition to and beyond the said sum of £800, &c. Breach, non-payment of the sum of £50. Plea, that after the 1st of January and before the said 25th of March plaintiff refused and neglected to introduce defendant as plaintiff's successor to &c., and would not use his best endeavours to establish defendant in his business; wherefore defendant refused to pay the £50. Verification:—*Held*, that the plea was bad, as the introduction of the defendant by plaintiff to his patients was not a condition precedent to the payment of the £50.

of £400 upon the execution of the said indenture, and the several sums of £100 on the 25th of March, in the years 1846-7-8-9 respectively, the said sums making together the sum of £800; that the defendant should, in consideration of such payments, be entitled to the entire profits of the said business from the 1st of January, 1845, the defendant paying all expenses of carrying on the said business from the said last-mentioned date; that the plaintiff should introduce the defendant to the patients and friends of the plaintiff, at first as a partner and ultimately as his successor, with the view and for the express purpose of securing to the defendant the confidence of the said patients and friends, and of obtaining for the defendant their future employment in the said business; that the business of the said partnership should be carried on at the then residence of the plaintiff at Ware, and that the plaintiff should continue to reside and to practise as a surgeon and apothecary in the same residence till the 25th of June, 1845, and should at all reasonable times be ready and willing to attend and advise and prescribe for patients, and to assist the defendant in carrying on the said business of a surgeon and apothecary till the 1st of January, 1846, and at all subsequent times when the plaintiff should be at the said town of Ware or in its immediate vicinity; that the plaintiff should, from and after the 1st of January, 1846, introduce the defendant as his successor in the said business, and should use his best endeavours to establish him in his practice as a surgeon and apothecary in the said town of Ware; in consideration whereof the defendant thereby covenanted and agreed to pay to the plaintiff the further sum of £50 on the 25th of March, 1846, in addition to and beyond the said sum of £800; that the defendant should purchase from the plaintiff all the medical fixtures, drugs, and instruments then belonging to and used in the surgery of the plaintiff at Ware aforesaid, at a valuation to be made in the usual

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manner, the amount of such valuation to be paid within two months of the date of the said indenture.—Averment of due observance and performance by the plaintiff of his part of the covenant. Second breach, non-payment of the said sum of £50, due on the 25th of March, 1846.

To this breach the defendant pleaded, that after the said 1st day of January, 1846, to wit, on &c., and on divers other days and times between that day and the 25th of March, 1846, being proper and reasonable times in that behalf, he the defendant requested the plaintiff to introduce him as his the plaintiff's successor in the said business, to divers persons, to wit, T. C., F. E., W. C., and W. H., and divers other persons whose names are to the defendant unknown, and which said persons had been, and at the time of the execution of the said indenture, and up to the time when the plaintiff was requested by the defendant as aforesaid to introduce him, were respectively patients of the plaintiff. Yet the plaintiff did not nor would, at those several days and times when he was so requested as aforesaid, or at any or either of them, or at any other time hitherto, introduce the defendant to the said persons or any or either of them, but on the contrary the plaintiff then wholly refused and neglected, and from thence hitherto hath refused and neglected, to introduce the defendant to any of the said persons, nor has the plaintiff, from the said 1st day of January, 1846, hitherto, introduced the defendant at all to any person whomsoever, as his the plaintiff's successor in the said business, nor has the plaintiff, at any time since the said 1st day of January, 1846, used any endeavour whatever to establish the defendant in the practice of a surgeon and apothecary in the said town of Ware, but the plaintiff has wholly neglected and refused so to do. And the defendant in fact saith, that the plaintiff hath not at any time hitherto performed any part whatever of the said alleged considera-

tion for his the defendant's said covenant to pay the plaintiff the said further sum of £50, contrary to the terms of the said indenture in that behalf. Wherefore he the defendant did refuse to pay the said sum of £50, so by him covenanted to be paid in consideration of the plaintiff's introducing him the defendant, and using his endeavours to establish him the defendant in the practice of a surgeon and apothecary, in the said town of Ware, as in the said indenture and in the said declaration mentioned, as it was lawful for the defendant to do for the cause aforesaid.—Verification.

Special demurrer, assigning for causes, that it is not stated in or by the plea, nor does it appear therefrom, that the plaintiff could or might, or that he had the means or opportunity of introducing the defendant to the patients in the plea mentioned, nor is it stated in or by the plea that a reasonable time had elapsed for the plaintiff's so doing before the commencement of the suit, or before the 26th day of March, 1846; and that the plea is bad, inasmuch as the covenant on the part of the plaintiff, to introduce the defendant to the plaintiff's patients, is not a condition precedent to the payment by the defendant to the plaintiff of the said sum of £50 in the declaration mentioned, but on the contrary thereof, the said covenant on the part of the defendant was and is a distinct and independent covenant, and in no way contingent on the performance by the plaintiff of his said covenant; and also, that it does not appear by the plea that the defendant was ready and willing; and also that the plea is only good by reason of being an argumentative denial of plaintiff's performance of the condition on which he was to be paid, if any such condition there was; and lastly, that the plea improperly concludes with a verification instead of to the country.—Joinder in demurrer.

Willes, in support of the demurrer.—The plea is bad. The introduction by the plaintiff of the defendant to his

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patients is not a condition precedent to his right to recover this sum of £50. If it were, the defendant would be absolved from payment of this sum if the plaintiff had neglected to do so in the smallest particular. It would also be unfair to the defendant if the covenant were to be considered as complete on the 25th of March, as the plaintiff would in that case be under no necessity of introducing him to any patient after the expiration of that time. The plaintiff is bound to use his best endeavours to introduce the defendant *after* the time fixed for the payment of the £50. Here the covenants are independent. The rule is correctly laid down in *Saunders (a)*, that "If a day be appointed for payment of money or part of it, or for doing any other act, and the day *is* to happen or *may* happen *before* the thing which is the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance; for it appears that the party relied upon his remedy, and did not intend to make his performance a condition precedent; and so it is where no *time* is fixed for performance of that which is the consideration of the money or other act." The note contains the report of *Sir Richard Pool's case*, which is in point. The plea is also bad, as it is in fact a traverse, and therefore improperly concludes with a verification.

Hawkins, in support of the plea.—The sum of £50 was added, that the plaintiff should use his best endeavours to introduce the defendant to his patients, and to establish him in his profession as an apothecary, before the 25th of March; that is the consideration for the additional sum of money. [*Pollock*, C. B.—It seems to me that it is quite consistent with this plea, that the plaintiff did use his best endeavours to introduce the defendant to other patients, though not the persons mentioned in the plea.] He cited *Collins v. Gibbs (b)*.

(a) 1 Wms. Saund. 320 h, n. 1.

(b) 2 Burr. 899.

PER CURIAM (a).—The introduction by the plaintiff of the defendant to his patients is not a condition precedent to the payment of the £50. The plaintiff would be under the obligation to introduce the defendant after the 25th of March.

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Judgment for the Plaintiff.

(a) *Pollock, C. B., Alderson, B., Rolfe, B., Platt, B.*

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June 7.

DEBT. The third count of the declaration was by the plaintiff, as the drawer of a bill of exchange payable to his own order, and accepted by the defendant.

Plea, that after the acceptance of the bill of exchange in the third count mentioned, and before the commencement of this suit, to wit, on &c., the plaintiff lost the bill of exchange in the third count mentioned out of his possession, and that the same at the commencement of this suit remained and still remains lost and not found, and the plaintiff was not, at the commencement of this suit, nor is he, the holder of the bill of exchange in the third count mentioned, or possessed thereof, nor hath the defendant found the same, nor is the same in his possession, custody, or power, or under his control.—Verification.

Replication, that after the acceptance of the said bill of exchange in the third count mentioned, and before the commencement of this suit, to wit, on the day and in the

The payee of a negotiable bill of exchange, having lost it, cannot, without producing it, maintain an action for the recovery of its amount against the acceptor upon its arriving at maturity.

Drawer of bill of exchange payable to his own order v. acceptor:—

Plea, that after acceptance, and before action, plaintiff lost the bill, and that it still remains lost, and that plaintiff was not then, nor now is, the holder or possessor of it.

Replication, that the bill had never been indorsed, nor was it transferable by delivery, or capable of being enforced or put in suit against defendant by any other person than plaintiff; that plaintiff up to the commencement of the suit, was alone entitled to be the holder, and to receive the amount of it from defendant, of which defendant at the commencement of the suit had notice:—*Held*, on demurrer to the replication, that defendant was entitled to judgment.

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year in the said plea mentioned, he the plaintiff lost the said bill of exchange in the third count mentioned out of his possession, and the same, at the time of the commencement of this suit, remained lost and not found, in manner and form as in the said plea mentioned, and the same still remains lost and not found. And the plaintiff further says, that by reason merely of such loss, and not for any other reason, cause, or matter, or upon any other account whatsoever, he the plaintiff was not the holder of the said bill or possessed thereof as in the said plea mentioned. And the plaintiff further says, that the said bill had not been nor was, either at the time it was so lost by him the plaintiff as aforesaid, or at the time of the commencement of this suit, or at any other time, nor hath it been, nor is it either indorsed by the plaintiff, or transferable by delivery, or capable of being enforced or put in suit against the defendant by any other person but the plaintiff. And the plaintiff further says, that up to and until and at the time when he the plaintiff so lost the said bill as aforesaid, he the plaintiff was always the holder thereof, and at the time of the commencement of this suit was, and from thence hitherto hath been and still is, alone entitled to be the holder thereof and to receive the amount thereof from the defendant. And the plaintiff further says, that at the time of the commencement of this suit the defendant had due notice that the plaintiff was not the holder or possessor of the said bill in the third count mentioned, for the reason aforesaid; that up to and until and at the time when the said bill was lost as aforesaid, the plaintiff had always been the holder thereof as aforesaid; that at the time when the said bill was so lost as aforesaid, or at any other time before the commencement of this suit, the said bill had not been either indorsed by the plaintiff, or transferable by delivery, or capable of being enforced, or put in suit against him the defendant, by any other person but

the plaintiff; and that at the time of the commencement of this suit, the plaintiff was alone entitled to be the holder thereof, and to receive the amount thereof from the defendant.—Verification.

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Demurrer, assigning for causes, that it does not appear that the plaintiff had not written his name on the back of the said bill at the time of the said loss, and that it does not sufficiently appear that the bill was not at the time of the loss in such a state that the defendant might have been or may be compelled to pay the same to a bonâ fide holder thereof, or that the defendant had notice or was informed that the name of the plaintiff was not written on the back of the bill; and that it does not appear at what time or on what day the defendant had the notice in the said replication mentioned; that the allegation of notice is not pleaded with sufficient certainty as to the time; that it does not appear that the defendant had such notice, or was requested to pay the bill, before the commencement of this suit, or that the plaintiff was ready or willing, or offered to give or gave the defendant any indemnity against being called upon to pay the said lost bill of exchange.

Joinder in demurrer.—One of the defendant's points was, that he should contend that the replication was bad on general demurrer.

Udall, in support of the demurrer.—The substantial question in the present case arises upon general demurrer, and is, whether a person who loses a bill of exchange, and consequently is unable to produce it, is entitled to recover upon it in an action against the acceptor. It is contended that he cannot, and that therefore the defendant is entitled to judgment upon general demurrer. The case of *Hansard v. Robinson* (a) is a direct authority upon this point. The

(a) 7 B. & C. 80.

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various cases upon the subject were well considered in that case, and are collected there; and the judgment of the Court was given after time taken for consideration. The ground of that decision was, that the acceptor, on paying the bill, had a right to the possession of it for his own security, and as his voucher and discharge pro tanto in his account with the drawer. And Lord *Tenterden* there says, "If upon an offer of payment the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, or retain his money?" And he proceeds thus, in a succeeding part of the judgment of the Court, which was delivered by him:—"Has the holder a right, by his own negligence or misfortune, to cast this burthen upon the acceptor, even as a punishment for not discharging the bill on the day it became due? We think the custom of merchants does not authorise us to say that this is the law." That case is a direct authority in the defendant's favour. The laches of the holder is not to be encouraged by the Court. It may be added, that a difficulty would arise in case it were necessary to take an objection to the stamp, if the instrument were not produced. The replication is also bad, for the causes assigned by the special demurrer. It does not shew that the defendant is wholly out of jeopardy; nor does it contain any allegation that the name of the plaintiff was not upon the back of the bill. The defendant might therefore be liable to an action from a *bonâ fide* holder, who had received the bill from some person by whom it had been found. *Marston v. Allen* (a) shews that the writing of a person's name on the back of a bill or note does not per se constitute an indorsement.

Hawkins, contra.—As to the last objection, the lan-

(a) 8 M. & W. 494.

guage of the replication is very strong. It is sufficiently alleged that there was no indorsement on the bill, and that nobody could sue upon it. As to the main question, the case of *Hansard v. Robinson* is distinguishable from the present. That was an action by an *indorsee* against the acceptor, and not by the *drawer*, as it is in the present case. It also appeared that the bill had been indorsed. [*Platt*, B.—In *Woodford v. Whiteley* (a), it was held by *Parke*, B., that an acceptance of a bill of exchange by the debtor, taken as payment by the creditor, must be taken as a discharge, if not proved by the creditor to be discharged, although it be proved to be lost.] It did not appear in that case whether the bill was indorsed or not. *Rolt v. Watson* (b) is on all-fours with the present case. It was there held, that the acceptance of a bill which had not been indorsed, and which had been lost, was no defence to an action for the value of certain goods for which the bill had been accepted. *Best*, C. J., there says:—"There is no decision in which the party has been held to be responsible in respect of an outstanding bill unindorsed. In all the cases in which a defendant has been holden to be discharged in respect of a supposed liability on a bill, the bill has been in such a state as to be likely to be used against him; as in *Champion v. Terry* (c), where the defendant paid for goods by a bill which he had indorsed in blank." *Wain v. Bailey* (d) was decided on the same principle as *Rolt v. Watson*. *Cunliffe v. Whitehead* (e) is also in point. This plea does not state that the bill was indorsed; it is therefore bad: *Price v. Price* (f). In *Smith v. McChure* (g), it was expressly held that it could not be presumed that a bill had been transferred which was payable to a man's own order, unless it appeared that such an

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(a) Moo. & M. 517.

(b) 4 Bing. 273.

(c) 3 Brod. & Bing. 295.

(d) 10 Ad. & Ell. 16.

(e) 3 Bing. N. C. 828; 5 Scott, 31.

(f) 16 M. & W. 232.

(g) 5 East, 477.

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order had been made. It is therefore not necessary to make that allegation in the replication.

Udall, in reply, relied upon *Hansard v. Robinson*, and the authorities referred to in that case.

Cur. adv. vult.

The judgment of the Court was (July 3) delivered by

PLATT, B.—In this action the plaintiff, in the third count, declared as the drawer of a bill of exchange, payable to his own order, and accepted by the defendant. The defendant pleaded, that after the acceptance of the bill, and before the commencement of the suit, the plaintiff lost the bill out of his possession; that the bill remained lost until and at the time of the commencement of the suit; and that the plaintiff at the time of the commencement of the suit was not, nor was he at the time of the defendant's pleading, the holder or possessed of the bill. The plaintiff replied, that by reason of such loss alone he was not the holder of the bill; that the bill, at the time it was so lost, and at the time of the commencement of the suit, had not been nor was indorsed by him or transferable by delivery, or capable of being enforced or put in suit against the defendant by any other person than the plaintiff; that until the loss he was always the holder, and from thence until and at the time of the commencement of the suit, was alone entitled to be the holder thereof, and to receive the amount thereof from the defendant; and that the defendant at the time of the commencement of the suit had due notice of the premises. To this replication the defendant demurred; and the question was, whether, upon the facts stated in the pleadings, the plaintiff was entitled to recover; in other words, whether the payee of a negotiable bill of exchange, having lost it, can, on its

arriving at maturity, without its production, maintain an action against the acceptor for recovery of its amount. On the part of the defendant, it was contended, according to the doctrine laid down by the Court of King's Bench in *Hansard v. Robinson*, that by the custom of merchants the holder of a bill should present the instrument at its maturity to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill; that the acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge, pro tanto, in his account with the drawer; that to one who should refuse or be unable to deliver up the bill, the acceptor is not bound to pay the sum therein specified. The plaintiff, admitting the general rule of law, sought to except from its operation cases in which the plaintiff's inability to deliver up the bill resulted from his having lost it while it remained payable to his own order, and cited *Wain v. Bailey*, *Rolt v. Watson*, and *Cunliffe v. Whitehead*. The first and third of these cases, however, do not appear to support the alleged exception. The note in *Wain v. Bailey* was not negotiable; it was not made payable to order, or to the bearer, but to the plaintiff only, who therefore alone could enforce the payment. In *Cunliffe v. Whitehead*, the plaintiff did not shew in his declaration that he was indorsee of the bill, but the bailee from a third person to whom it had been indorsed; and the Court held that as such mere bailee he had not any right of action. The general rule is supported by Lord Eldon's observations in the case *Ex parte Greenway* (a), and the decisions in *Pierson v. Hutchinson* (b), *Bevan v. Hill* (c), *Mayor v. Johnson* (d), *Poole v. Smith* (e), *Dangerfield v. Wilby* (f),

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(a) 6 Ves., jun., 812.

(b) 2 Camp. 211.

(c) 2 Camp. 381.

(d) 3 Camp. 324.

(e) Holt, N. P. C. 144.

(f) 4 Esp. 159.

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Davis v. Dodd (a), and *Champion v. Terry* (b). On the other hand, *Long v. Baillie* (c), *Glover v. Thomson* (d), and *Dart v. Hincles* and *Rolt v. Watson*, quoted respectively by the plaintiff's counsel in *Hansard v. Robinson*, are authorities in support of the exception. But in the discussion of *Hansard v. Robinson*, all those cases were brought before the Court of King's Bench; and that Court, after taking time to consider, overruled such of them as supported the exception, and decided, as we think properly, that, according to the custom of merchants, the acceptor of a negotiable bill was not bound to pay unless the party demanding payment produced, and offered to deliver up, the instrument itself. This decision governs the present case. The bill accepted by the defendant was negotiable; and the plaintiff, by reason of his loss of it, being unable to produce it to the defendant, cannot by the law of merchants compel him to pay the amount. As to the third count, therefore, the defendant is entitled to judgment on the demurrer.

Judgment for the defendant.

(a) 4 Taunt. 602.

(c) 2 Camp. 214, n.

(b) 7 Moore, 130; 3 Brod. &
 Bing. 295.

(d) Ryan & Moo. 403.

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BERDOE v. SPITTLE.

June 7.

DEBT.—The declaration commenced thus:—"Walter Berdoe, the plaintiff in this suit, by John Thomas Saunders his attorney, complains of George Spittle, who has been summoned," &c. The first count was for goods sold and delivered. The second count stated, "that the defendant was indebted to the plaintiff in 5*l.* 10*s.* 4*d.*, for the price and value of work then done, and materials for the same provided by the plaintiff for the defendant, at his request." The third count was on an account stated: and the general breach alleged therein was, "yet the defendant has not paid the same or any part thereof."

Declaration, containing three counts, commenced that "A. B., by his attorney, complains, &c., who has been summoned;" 2nd count, for work and materials "provided for defendant, at his request." Breach in last count, that "defendant has not paid the same:"—*Held*, on special demurrer, that first and last counts were good; second, bad.

Special demurrer, assigning for causes, that the declaration contained divers blanks and void spaces, and that it was not alleged in the breach that the defendant had not paid the plaintiff, but only that he "has not" paid the same, and the said "has" was uncertain and unintelligible.—Joinder in demurrer.

Hawkins, in support of the demurrer.—The second count is at all events bad, as it is not stated at whose request the work was done; and the blanks render the first and third counts bad, for the reasons assigned by the special demurrer (a).

Lush, contra.—The last objection is frivolous. In *Ferguson v. Mitchell* (b), *Parke*, B., says, "The recital of the writ in the commencement of a declaration in debt was held by the Court of King's Bench, in *Lord v. Houstoun* (c), to be surplusage, and that the words 'of a plea that the

(a) Com. Dig. Pleader, (C. 41). C., M., & R. 687.

(b) 4 Dowl. P. C. 513; S. C., 2 (c) 11 East, 62.

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defendant render,' &c., might be rejected as surplusage; and that was decided on special demurrer."

The second count is good. It is not necessary to state a request, where it is alleged that the work and labour were done by the plaintiff for the defendant. [*Rolfe, B.*—It is not necessary in the case of money lent, but here the work might have been done at the request of a third party.] Then the defendant would not be indebted to the plaintiff. The Court should hold that *h* means *his*, by reasonable indentment. The other counts are clearly good, and the demurrer is not confined to the second count, but is to the whole declaration.

PER CURIAM (*a*).—There must be judgment for the plaintiff on the first and last counts, and for the defendant on the second.

Judgment accordingly.

(*a*) *Pollock, C. B., Alderson, B., Rolfe, B., and Platt, B.*

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June 2.

SIDEBOTTOM v. The Commissioners of the GLOSSOP
RESERVOIRS.

TRESPASS for breaking and entering the plaintiff's cotton mill, situated at Broadbottom, in the parish of Mottram in Longdendale, in the county of Chester, and seizing therein certain goods of the plaintiff, &c.

The defendants justified under stat. 1 Vict. c. lxxix, which is "An Act for making and maintaining Reservoirs upon the tributary Streams of the River Etherow, otherwise the Mersey, in the parish of Glossop, in the county of Derby, for more effectually and regularly supplying with Water the Mills, Manufactories, and Works on the said tributary Streams and River."

The plea stated, that the defendants were commissioners for carrying the act into effect, and that they completed *one* reservoir, namely, the Hurst reservoir, upon the upper part of one of the tributary streams of the river Etherow;

Trespass for breaking and entering plaintiff's mill, and taking his goods. Plea, under 1 Vict. c. lxxix, (local), that defendants, as commissioners under the act, completed *one* of three reservoirs mentioned therein; that plaintiff's mill was benefited by the supply of water therefrom; that a certain rate was made, and that the trespass was committed and

the goods were taken as a distress for non-payment of the rate. Replication, that only *one* reservoir had been completed. The act was for making and maintaining reservoirs upon the tributary streams of the river Etherow, otherwise the Mersey, in the parish of Glossop, in the county of Derby, for more effectually and regularly supplying with water the mills, manufactories, and works on the said tributary streams and rivers. The preamble of the act recites that certain manufacturing trades were extensively carried on along the tributary streams of the river Etherow, otherwise the Mersey, and along the said river, and that great inconvenience was felt by persons engaged in those trades from the supply of water being inadequate to propel the machinery of their mills, &c., situated thereon; and that such inconvenience would be greatly removed by the construction of proper reservoirs for creating a regular supply; and that there were three eligible situations for such reservoirs in three narrow valleys in the township of Glossop, Whitfield, Simmondley, and Chunal, in the parish of Glossop, through which the said tributary streams, called &c., ran, by which the mills, &c., might be regularly supplied with water; and that it would be of great advantage to the occupiers of the mills, &c., and of the lands adjoining, and to the public, if the object were accomplished. The style of the corporation to be "The Commissioners of the Glossop Reservoirs." By s. 18, the persons qualified to vote at meetings are the occupiers rated, or who would be liable to be rated, if the reservoirs to be made were then actually made and in use. By s. 33, the commissioners are empowered to levy rates yearly, or half yearly, upon all persons who shall occupy any part of the said tributary streams or river Etherow, and the falls, within certain limits, in certain proportions. By s. 34, separate rates are to be levied for each reservoir, and separate accounts to be kept. By s. 39, the commissioners are to appoint persons to survey and ascertain the height of falls, and degree of benefit derived by the said mills, &c. S. 38 enacts, that "no rate shall be levied or assessed under the provisions hereinbefore contained until *the said reservoirs* shall be actually made and in use, and water supplied therefrom:—*Held*, that the completion of *one* reservoir entitled the commissioners to levy a rate on the persons actually benefited by it; and therefore that the plea was good.

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that they constructed the necessary works as required by the act; that "the said reservoir and the said works connected therewith were used by the defendants, as such commissioners as aforesaid, for the providing a more regular supply of water in the said tributary stream and the said river Etherow, and a more regular supply of water was during all that time provided in the same from the said reservoir of Hurst, and to the plaintiff's mill;" that the defendants, as such commissioners, appointed one T. G. as inspector and surveyor, to inspect and survey the whole of the streams, &c., the supply of water in which might be regulated and affected by the Hurst reservoir, to measure and ascertain the height of the falls existing therein respectively, &c.; and that the said T. G. was to report to the defendants the amount of the falls, and to ascertain and determine the relative degree or proportion of the benefit which such mills, &c., then received." The plea then proceeded to state, that, T. G. having made his report of the benefit derived by the plaintiff by reason of the fall of water, an assessment was made, and a rate; and that the plaintiff was rated to pay a certain sum of money for the expenses of this reservoir. The plea contained various allegations, in order to satisfy the conditions of the act of Parliament, and concluded by alleging that the defendants entered the mill and took the goods as a distress for non-payment of the rate.

Replication, that at the time of making and levying the said rate in the plea mentioned, the said reservoirs in the said act mentioned were not actually made nor in use, nor was water supplied therefrom; and at the said time of making and levying the said rate, *one* only of such reservoirs was actually made and in use, and water supplied therefrom.—Verification.

General demurrer, and joinder.

The defendants' point was, that the replication attempts to raise an immaterial issue, and that it is quite sufficient

that the said *one* reservoir was made, under the circumstances and in the manner set forth in the plea.

The plaintiff's points were, that, under the 38th section of the act, under the authority of which the rate in question purports to have been made, it is a condition precedent to the levying or assessing of any rate, that *all* the three reservoirs mentioned in the said act should have been actually made and in use, and water be supplied therefrom, and that the matter alleged in the replication is consequently material; and also that the plea is insufficient, for want of an express allegation that the reservoirs were actually made and in use before and at the time when the rate was levied and assessed (*a*).

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(*a*) The following sections of this act are alone material to the present case:—

Sect. 1. The preamble recites, that "Whereas the spinning and manufacturing of cotton, the process of calico printing, and other manufacturing trades, are extensively carried on along the course of the tributary streams of the river Etherow, otherwise the Mersey, and of the said river: and whereas great inconvenience is felt by persons engaged in such trades from the supply of the water in the said tributary streams and river at certain seasons of the year being inadequate to the propelling of the machinery in the mills, manufactories, and works thereon; and whereas it appears that such inconvenience would be greatly relieved, if not wholly removed, by the construction of proper reservoirs for the impounding of water therein in times of flood and rainy seasons, and delivering the same out in a

regular diurnal supply for the use of the mills, manufactories, and works upon the said tributary streams and river, and that there are eligible situations for the formation of such reservoirs in three narrow valleys in the townships of Glossop, Whitfield, Simmondley, and Chunal, in the parish of Glossop aforesaid, through which the said tributary streams called Shelf Brook, Hurst Brook, and Chunal Brook, run, and which, by short embankments, may be made capable of containing and delivering a regular supply of water for the use of the said mills, manufactories, and works; and whereas it would be of great benefit and advantage to the owners and occupiers of the several mills, manufactories, and works on the said tributary streams and river, to the occupiers of the lands adjoining thereto, and to the public at large, if the said objects were accomplished." Certain] commis-

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Watson (with whom was *Hoggins*) in support of the demurrer.—The question which is raised on the demurrer

sioners were then named, the name of the body corporate to be, "The Commissioners of the Glossop Reservoirs."

Sect. 2 enacts, "That in case any commissioner hereby appointed, or hereafter to be appointed, under or by virtue of this act, shall die, or desire to be discharged, or refuse or decline or become incapable to act as a commissioner under this act, then and in every such case a new commissioner shall be elected in his room at an annual, extraordinary, or adjourned general meeting of the occupiers of the said tributary streams and river, and of the falls to be supplied with water therefrom, to be constituted and convened in manner hereinafter mentioned; and every such new commissioner shall have the like powers and authorities in all respects to act as a commissioner in the execution of this act as if he had been originally appointed a commissioner in and by this act; but none of the powers hereby given to the said commissioners shall be suspended or affected by reason of any vacancy which may occur as aforesaid not having been filled up. Provided always, that at least one half of the number of the commissioners for the time being shall be owners in their own right, or in right of their wives respectively, of some part or parts of the said tributary streams or river, or the falls supplied therefrom respectively."

Sect. 10 enacts, "That the said commissioners shall and they are hereby required to order and direct proper books to be provided and kept by their clerk for the time being, in which books such clerk shall enter, or cause to be entered, true and regular accounts of all sums of money received, paid, laid out, and expended for such commissioners in the execution and by virtue of this act, and of the several articles, matters, and things for which sums of money shall have been disbursed, laid out, and paid; and such books shall at all times be open, without fee or reward, to the inspection of every person who shall for the time being be a commissioner under this act, and of every such occupier of the said tributary streams, river, or falls, as under the provisions hereinafter contained shall for the time being be liable to be assessed to the rates hereinafter authorised to be imposed, or would be so liable if the said reservoirs hereby authorised to be made were then actually in use, and of every mortgagee of the said rates; and every such commissioner, occupier, and mortgagee shall or may take copies of or extracts from the said books, or any part thereof, without paying anything for the same; and in case the said clerk shall refuse to permit, or shall not permit any such commissioner, occupier, or mortgagee to inspect any such books, or take such copies or extracts as

to the replication arises also on the plea. It is simply, whether or not the commissioners, upon the completion of

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aforesaid, such clerk shall forfeit and pay any sum of money not exceeding five pounds, to be levied or applied in the same manner as other penalties are hereinafter directed to be levied and applied."

Sect. 13 enacts, "That, once at least in every year, the said commissioners shall and they are hereby required to make a just and true statement and account of all sums of money by them received and expended in the execution of this act, and shall cause a competent number of copies of every such statement or account to be printed, and one of such copies to be laid before the annual general meeting of the occupiers of the same tributary streams, rivers, and falls, and also one of such printed copies to be sent by the post at least fourteen days before the time appointed for the holding of such annual general meeting, to every occupier who under the provisions hereinafter contained shall be qualified to attend and vote at such annual general meeting."

Sect. 18 enacts, "That the only persons who shall be entitled to attend and vote at the said annual, extraordinary, and adjourned general meetings of occupiers shall be the persons who, under the provisions hereinafter contained, shall for the time being be liable to be assessed to the rate hereinafter authorised to be imposed, or would

be so liable if the reservoirs hereby authorised to be made were then actually made and in use."

Sect. 19 enacts, "That, after the said reservoirs hereby authorised to be made shall be actually in use, no person shall be entitled to attend and vote at the said annual, extraordinary, and adjourned general meetings of occupiers, unless he shall have actually paid and satisfied all the rates, if any, which shall for the time being have been assessed upon him under or by virtue of this act, if payment thereof shall have been demanded of him by the collector or other person authorised by the said commissioners to demand and receive the same."

Sect. 31 enacts, "That the said commissioners may and they are hereby authorised and empowered, upon the site of any messuages or tenements, or upon any lands or hereditaments which shall have been purchased and paid for by them under the authority of this act, by themselves, their deputies, agents, officers, workmen, and servants, to make, complete, and maintain, upon the upper part of the said tributary streams called the Shelf Brook, the Hurst Brook, and the Chunal Brook, three competent and sufficient reservoirs, to be called the Shelf Reservoir, the Hurst Reservoir, and the Chunal Reservoir, with proper roads and approaches to and from the same,

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one reservoir only, are entitled to make a rate, the plaintiff having derived benefit from the supply of water

for the purpose of providing a more regular supply of water in the aforesaid tributary streams and river, and to construct proper and substantial embankments, and also to supply the said reservoirs with water by means of the said tributary streams; and also to make, form, erect, and construct, in, upon, or near the said reservoirs, such flood gates, spill waters, weirs, dams, banks, embankments, drains, sluices, and other works, as the said commissioners shall think necessary for providing and securing a regular supply of water in the said tributary streams and river, and for allowing the escape of the waters, and for the security, repair, and maintenance of the said reservoirs and other works; and also to erect and build, in some convenient situations near the said reservoirs and other works, and at all times thereafter to keep in good repair, a house or houses and other necessary buildings for the habitation of a person or persons to be from time to time appointed by the said commissioners as superintendent or superintendents to the said reservoirs and other works, and such person so to be appointed shall always be resident close to the said reservoirs and other works, and shall have full power and authority (subject nevertheless to the control of the said commissioners) to superintend and

regulate the supply of water in the said streams and river, and by means of the said reservoirs, flood gates, and other works, to keep up and maintain a uniform supply of water for the said streams and river."

By sect. 33, "in order to raise money for carrying the several purposes of this act into execution," it is enacted, "That one or more rate or rates shall be made, levied, or assessed by the said commissioners at yearly or half-yearly periods, if they shall think necessary, upon all persons who shall occupy as hereinafter mentioned any part of the said tributary streams, between their exit from the said intended reservoirs and their junction with the said river called the Etherow, otherwise the Mersey, or shall occupy as hereinafter mentioned any part of the said river called the Etherow otherwise the Mersey between the place of its junction with the said tributary streams as aforesaid and its junction with a certain river called the Goyt, or shall occupy as hereinafter mentioned any part of the said river called the Etherow otherwise the Mersey between the place of its junction with the said river Goyt and its junction with another certain river called the Tame at or near the Borough town of Stockport in the county palatine of Chester, or shall occupy as hereinafter mentioned any fall which shall be supplied

which the reservoir had afforded to his mill. It is submitted, on the part of the defendants, that, according to

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with water from the said tributary streams and river, or any of them; but which said rates shall nevertheless be made, levied, and assessed upon the said persons now occupying as aforesaid or hereafter to occupy any fall of water upon the said tributary streams and river in the manner and according to the proportions following; (that is to say,) a full rate upon all such persons now occupying or hereafter to occupy any fall upon the said tributary streams; and upon all persons now occupying or hereafter to occupy any fall upon the said river Etherow or Mersey, from its junction with the said tributary streams to its junction with the said river Goyt, two thirds of a full rate; and upon all persons now occupying or hereafter to occupy any fall upon the said river Mersey or Etherow, between its junction with the said river Goyt and the said river Tame at or near the borough town of Stockport aforesaid, one fourth of a full rate."

By s. 34 it is provided, "That separate rates in the proportions hereinbefore mentioned shall be made, levied, and assessed by the said commissioners for or in respect of the said reservoirs hereby authorised to be made; and separate and distinct accounts shall be kept of all monies secured, paid out, and expended by the said commissioners on account of each of the said reser-

voirs; and the said rates so made, levied, and assessed shall be applied towards or on account of the expenses attending the reservoir, for or in respect of which such rates are or shall become payable."

By s. 37 it is provided, "That no rate or rates to be levied or assessed as aforesaid shall exceed in any one year the sum of fifty shillings for every foot of fall hereby made liable to be rated as aforesaid, except when necessary to provide for the interest of any sum or sums of money which may be borrowed for any damages arising from the breakingdown of the said embankments as hereinafter mentioned: provided also, that in case any part of the said tributary streams or river or fall thereof, or any water derived therefrom, shall during any part of the year be so employed or applied as to become liable to be assessed to the rates hereby authorised to be imposed, then and in every such case the same shall continue liable to be assessed as aforesaid during the whole of the then current year, such year commencing on the first day of August and ending on the thirty-first day of July, it not being intended that any allowance should be made for the preceding or subsequent fraction of a year during which the same shall not be employed or applied as aforesaid."

By s. 38 it is provided, "That

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the reasonable construction of this act of Parliament, the completion of *one* reservoir, where benefit is derived from

no rate shall be levied or assessed under the provisions hereinbefore contained, until *the said reservoirs* shall be actually made and in use, and water supplied therefrom."

Sect. 39 enacts, "That the said commissioners shall at their first meeting, or as soon after as conveniently may be, and also after the reservoirs or embankments, or any of them, or any part thereof respectively, shall be begun or completed, so often as circumstances may render it necessary, from time to time, and they are hereby authorised and required, to appoint some person or persons, not being owner or owners or occupier or occupiers of any mill or works liable to be rated or assessed by virtue of this act, as inspector or inspectors, surveyor or surveyors, to inspect and survey the whole or any part of the said several streams, rivulets or brooks, and rivers, and to measure and ascertain the height of the falls existing thereon respectively, and to determine the levels of the said several streams, rivulets or brooks, and rivers or falls respectively, and to inquire into and ascertain, and (according to the number, power, or capacity of any engines, wheels, or machinery of the mills, factories, and premises using the water or any such falls, streams, rivulets, brooks, and rivers) to determine the relative degree or proportions of the benefit and advantage which such mills, factories, and

premises receive or shall at any time hereafter receive therefrom or thereby, and also to ascertain and determine, in cases where two or more mills occupied by different persons or parties are or shall be situate on one or the same fall, the relative value of the benefit received by such concurrent occupiers, to the end that the said commissioners may, from the report of such inspector or inspectors, or surveyor or surveyors, be the better enabled fairly and equitably to make and assess the said rates or assessments in proportion to the height of such falls respectively, and to the degree or proportion of benefit and advantage which is or shall at any time hereafter actually be received by the occupiers of such respective mills, factories, and premises, from the use of such waters or any of them; and for such purposes it shall be lawful for such inspectors, surveyors, and assistants from time to time to enter into and upon the lands and works adjoining or near the said streams, rivulets or brooks, and rivers respectively."

Sect. 46 enacts, "That the sums of money to be rated, assessed, and imposed, raised, levied, and received by the said commissioners, by virtue of this act, shall be applied, in the first place, in payment of all the costs, charges, and expenses attending and incident to the applying for

it, will entitle the commissioners to make a rate; and it is not a condition precedent to the making of the rate that

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and passing of this act, and in the next place in paying from time to time the interest of the principal money to be borrowed by the said commissioners, in virtue of the powers hereinafter contained, and in carrying into execution the several purposes of this act, and the residue thereof shall from time to time be applied in paying off the principal money so to be borrowed by the said commissioners."

By sect. 47, "for the more speedily raising money for carrying the purposes of this act into execution," it is enacted, "That it shall be lawful for the said commissioners from time to time to borrow and take up at interest upon the credit of the rates to be raised and levied by them by virtue of this act, in such manner as they shall think proper, any sum or sums of money which they shall think necessary to be borrowed, not exceeding in the whole the sum of 15,000*l.*, to be applied in or towards making or maintaining the said intended reservoirs and works, and for the general purposes of this act; and the said commissioners are hereby empowered from time to time to assign by way of mortgage the said rates to be raised and levied by them under or by virtue of this act, or any part or proportion, parts or proportions thereof, as a security to any person or

persons who shall advance such sum or sums of money, or to his or their trustee or trustees, and his or their respective executors, administrators, and assigns, for the principal money so to be advanced, with such lawful interest for the same as shall be agreed upon in that behalf; and every such mortgage shall be made by deed in writing under the common seal of the said commissioners duly stamped, in which the consideration for such mortgage shall be truly specified, and the same may be in the form or to the effect following," &c.

By s 72, after reciting "that the said reservoirs, embankments, conduits, and other works may be more safely and securely made and completed if the works hereby authorised to be carried into execution are done at intervals of time, so as to enable the said embankments and other works to settle and become firm and solid:" and that "it has been estimated that the same works may be safely and securely completed within the space of ten years," it is enacted, "That if the said reservoirs, embankments, conduits, and other works hereinbefore described, and intended to be carried into effect under the authority of this act, shall not have been completed within the space of ten years from the passing of this act, then and from thenceforth all the powers and authorities

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all the reservoirs should be completed. The question turns on the construction to be put on the 38th section, as taken in connection with the other parts of the act. By that section it is provided, that "no rate shall be levied or assessed under the provisions hereinbefore contained, until the said reservoirs shall be actually made and in use, and water supplied therefrom." By the 34th section, *separate* rates are to be made for each reservoir, and *separate* accounts to be kept. The 39th section empowers the commissioners to appoint persons to survey and ascertain the height of falls, and the degree of benefit received by the different occupiers of mills. It is surely not necessary that all the works should have been completed before the inspector or surveyor can be appointed to ascertain the benefit derived by the mills. It must be after the reservoirs, *or any of them*, shall have been completed. There are many other clauses of the act which lead to the same inference.—He was then stopped by the Court.

Welsby, contra.—The general scope of this act of Parliament requires the 38th section to be construed according to the meaning which its words naturally and grammatically import. It is therefore contended, that the commissioners have no power to make any rate until *all* the reservoirs shall have been completed. The 38th section, unless it be limited or qualified by some other clauses of the act, plainly provides against the imposing of any rate until *all* the works

given by this act shall cease and determine as to all such and so much of such works as shall not have been completed within such time, but without prejudice to all or any of the rights, powers, and privileges as to such and so much of the said works as shall have been completed within such time, and also saving all such

matters and things as shall have been transacted, and such contracts and agreements as shall have been made, in pursuance of the powers herein contained, and so that the said commissioners be not discharged from any liability or obligation to any person arising out of the provisions herein contained."

contemplated by the act shall have been completed. [*Rolfe*, B.—There are many cases where from the context the word “respectively” must of necessity be implied.] By the 34th section, the commissioners have power to impose rates in respect of each reservoir; but that may be after all are completed; and the 38th section would be nugatory, if it did not impose a further limitation on the commissioners. [*Platt*, B.—By your construction of the clause, the word “all” must be imported into it.] Not so; the term “the said reservoirs” grammatically means the three reservoirs to be made under the act of Parliament. If the other construction had been intended, the words would have been “*until any of the said reservoirs.*” The title of the act shews that one general scheme alone for making *three* reservoirs, for the general benefit of an entire district, was contemplated. [*Alderson*, B.—The 38th section states that no rate shall be levied or assessed under the provisions *hereinbefore* contained; by the 33rd section, the rate is to be levied on *all* persons.] If the parties are rateable upon the completion of one reservoir, they will have to incur the expenses of the works, although many of them may have received no benefit. [*Alderson*, B.—The 39th section provides for them, and explains the 33rd. *Pollock*, C. B.—According to your construction of the act, if the ten years limited by the 72nd section have elapsed, and only one or two of the reservoirs are then completed, the parties who have advanced money on the security of the rates have all lost their security.] The act gives a long period, which the legislature contemplates will be “safely” sufficient for the construction of all the works; the parties advance their money on the faith of that, and cannot complain of their own bargain. [*Alderson*, B.—By the 18th section, two classes of persons are made by the legislature; the position now contended for only contemplates one.] It is one large and combined scheme, and it is submitted that no rate can be levied until all the reservoirs are completed.

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ALDERSON, B.—I should agree with the proposition contended for on the part of the plaintiff, if the rates were general, but I think they are separate. I therefore am of opinion that the rate is properly levied on the completion of one reservoir, and that the defendants are entitled to judgment.

ROLFE, B.—I am of the same opinion. I think that each separate class of works benefits a particular class of individuals, and that the rate was properly made upon the completion of one reservoir.

POLLOCK, C. B., and PLATT, B., concurred.

Judgment for the defendants.

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VACATION SITTINGS AFTER TRINITY TERM.

GOODE and Another v. BURTON.

July 23.

DETINUE for deeds, described in the declaration as indentures of lease and release of certain hereditaments.

Plea, that the said deeds were and are certain title-deeds of and exclusively relating to certain lands, hereditaments, and premises of the defendant, in the same indentures respectively particularly mentioned and described, and which said lands, hereditaments, and premises, before the alleged detention in the declaration mentioned, it was agreed by and between the defendant and the plaintiffs should be sold, transferred, and conveyed by the defendant to the plaintiffs, and by them purchased of and from the defendant, at and for a certain price or sum of money, to wit, £1000, and which lands, hereditaments, and premises were accordingly, before the happening or accruing of the cause of action in the declaration mentioned, sold by the defendant to the plaintiffs; that is to say, that the defendant executed a certain conveyance thereof to the plaintiffs, but no part of the purchase-money was ever paid by the plaintiffs to the defendant, for, upon, or in respect of the said purchase, but the same and every part thereof remains wholly due and unpaid to the defendant; and which said deeds in the declaration mentioned were, and each and every of them was, the title-deeds and deeds of &c. relating to the said lands, hereditaments, and premises, and not otherwise; that the defendant hath at all times been ready and willing, as the plaintiffs well know and then had notice, to transfer and deliver over to the plain-

A vendor of land, who has conveyed the legal estate to the vendee, has no lien on the title-deeds for the unpaid purchase-money.

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tiffs the said deeds, and each and every of them, and the custody or possession thereof, upon the payment of the said purchase-money by the plaintiffs to the defendant; and that, save as aforesaid, the plaintiffs never had any right or title to the said deeds or either of them, or to the custody or possession thereof; and the defendant in fact saith, that at the said time when &c. he detained and still detains the said deeds, and each of them, for and as and by way of a lien for the said purchase-money, and not otherwise, as it was and is lawful for him to do, which is the detainer in the declaration mentioned. Verification.

To this plea the plaintiff demurred specially; but the general ground of demurrer was alone relied on in the argument.

Peacock argued in support of the demurrer (May 28).—The vendor of land, who has conveyed the legal estate to the vendee, has no lien on the title-deeds by reason of the purchase-money remaining unpaid. He may perhaps have a lien in equity, or rather an equitable charge,—but he has no lien at law. If the vendee were ousted, and brought an action of ejectment to recover possession of the land, it would be no defence to say that he had not paid the purchase-money. The right to the title-deeds follows the land; and the vendor should not have executed the conveyance until the purchase-money was paid.

The Court called on

Whitehurst, *contra*.—The vendor would clearly have a lien on these deeds in equity; and there is no real distinction between an equitable and a legal lien. In *Sugden's Vendors and Purchasers* (a), it is said, "Where a vendor delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the estate

(a) Vol. 2, p. 856, 11th ed.

be or be not conveyed, and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold, gives the vendor a lien on the land for the money." [*Rolfe*, B.—"Lien," in a court of equity, is materially different from the meaning which is attached to that term in a court of law. An unpaid vendor of real estate would be entitled to file a bill in equity, and get the land sold.] The reason why equity gives a lien upon the land is, that there is an implied agreement that the vendor shall hold the deeds until the purchase-money is paid. The same principle will apply to a lien at law. The unpaid vendor of goods has clearly a lien upon them at law, and it is difficult to see any distinction between that case and the present; for it would be against reason and justice to allow the vendee to have possession of the deeds when he refuses to pay for the land. In Brooke's Abridgment, tit. "Charters de terre et detinue de eux," pl. 67, it is said, "A man enfeoffs another, he shall not have the charters unless the feoffor gives them to him." In *Esdaile v. Oxenham* (a), the plaintiff, having contracted to purchase an estate, had the deeds of conveyance prepared at his own expense, and sent to the vendors, who executed them. The deeds afterwards came into the possession of the defendant, who was the attorney of the vendors, and who claimed to have a lien upon them; and *Bayley*, J., says, "The defendant could have no greater right than the Brickdales (the vendors), and upon payment of the purchase-money to them, they could not have retained the deeds. But now the defence set up is, not a title in the defendant, but the want of a sufficient title in the plaintiff; and it is argued, that, the deeds having been executed, the plaintiff cannot demand the possession of them; that is setting up the *jus tertii*, the right of the Brickdales, against the right of the plaintiff. If the ques-

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tion were to be considered with reference to these documents in the character of deeds, there might be considerable weight in the argument, particularly if *it had been shewn that Messrs. Brickdale had opposed the delivering up of the deeds*. But these deeds were prepared at the expense of the plaintiff; when sent to be executed they were his property, and there cannot be any doubt that he might have claimed to have them back if they had never been executed. They were parted with by the plaintiff that they might be rendered an effectual conveyance to him from several persons, and that he should have back that conveyance on payment of the purchase-money." And *Holroyd, J.*, says, "This appears to have been a transaction between a vendor and an intended vendee. Now the person selling is bound to procure the execution of the conveyance by all necessary parties, and if any of them refuse to execute, the contract may be considered as rescinded. Such was the case in this instance; the execution by the Brickdales cannot therefore put the plaintiff in a worse situation than he was in before. The instruments then remained the property of the plaintiff. *If indeed they had been executed by all the necessary parties, he could not have claimed them without tendering the residue of the purchase-money*; but that was not done, and, on the contrary, the bargain was abandoned." The parties afterwards brought the case before the equity side of the Exchequer (a), and the Lord Chief Baron, in his judgment, says, "there is no distinction between a lien at law and a lien in equity,—at least there can be no difference in the present case." That case was afterwards re-heard (b), when the Lord Chief Baron adhered to his former opinion. [*Platt, B.*, referred to *Winter v. Lord Anson* (c)].

Peacock, in reply.—The question whether the unpaid

(a) *Ozenham v. Esdaile*, 2 Y.
& J. 493.

(b) 3 Y. & J. 262.

(c) 3 Russ. 488.

vendor of an estate has a lien on the title-deeds did not arise in *Esdaile v. Ozenham*. That case only decided that, the contract having been abandoned, the plaintiff, at whose expense the deeds had been prepared, was entitled to have them, as so much stamps and parchment. *Holroyd, J.*, says, "From the nature of the transaction, it would be a question for the jury, whether it was not intended that the deeds should operate as an escrow only." The language of the judges must therefore be understood with reference to cases where the deed of purchase has been delivered as an escrow. In the present case the deed of purchase was executed, therefore the title-deeds passed with the land. In *Lord Buckhurst's case (a)*, it was resolved, secondly, "if a man seised in fee simple conveys land to another and his heirs without warranty, all the title-deeds belong to the purchaser, as incident to the land, though not granted by express words." In *Atkinson v. Baker (b)*, Lord *Kenyon* says, "Here the heir-at-law is entitled to the estate as a special occupant, and has consequently a right to retain the possession of those documents which belong to the estate." Title-deeds are so completely parcel of the realty, that at common law no larceny could be committed of them (c). The possession of the title-deeds is necessary to enable the purchaser to defend his title, and if he has not paid the purchase-money, the vendor has a remedy in equity, by which he can charge the land itself.

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Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B. (After stating the pleadings).—There is no doubt but that the title-deeds of an estate *prima facie* belong to the owner. This is always stated and admitted in all the cases and text-books as clear law;—see par-

(a) 1 Rep. 1.

(b) 4 T. R. 229.

(c) 3 Inst. 109.

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ticularly *Lord Buckhurst's case* (a), and Com. Dig., tit. "Charters," (A.) In all the cases where any question has been raised on this subject, the argument has been, not that the rule does not exist, but that on some special ground it is not applicable in the particular case; as, for example, where the feoffor has enfeoffed with warranty, there it is said he shall retain the title-deeds, to enable him to sustain his warranty. It was on this point mainly that the resolutions in *Lord Buckhurst's case* proceeded; and we advert to them only for the purpose of shewing that on the general rule, namely, the right of the owner to have the deeds, as something annexed to his estate in the land, no doubt was ever raised.

The only authority cited against this was the passage from Brooke's Abridgment, ("Charters de terre et detinue de eux," pl. 67), on which, however, we can only say that it must have been written with reference to something special; for, as a general proposition of law, it is clearly not to be supported. It follows, therefore, that the plaintiff, appearing as he does on these pleadings to be the owner of the land, is certainly also entitled to the title-deeds, unless there be something in the plea to cut down his *primâ facie* right.

The ground on which the defendant rests his defence is, that, being the vendor of the estate to which the title-deeds related, he conveyed it before the purchase-money was fully paid, and he therefore claims a lien on the deeds, by way of security for payment of the balance of the purchase-money due to him. It will be observed, that he does not allege that the conveyance to the plaintiff was not an absolute and complete conveyance; he does not suggest that it was merely executed as an escrow, or under any special contract for a lien,—so that the defendant's right, if it exist at all, must exist by virtue of some general principle of law, which in every case where a vendor has

conveyed his estate without receiving the full amount of his purchase-money, creates in his favour a lien on the title-deeds for the balance unpaid. It was admitted that no decision is to be found supporting the proposition contended for, and the only dictum relied on is what fell from Mr. Justice *Holroyd*, in the case of *Esdaile v. Oxenham* (a). But that was altogether extra-judicial, and may well be explained on the supposition that Mr. Justice *Holroyd* was looking to a case where the purchase-deed had been executed merely as an escrow, to be handed over on payment of the purchase-money, in which case the expressions attributed to that learned judge would be quite accurate.

The main argument of the defendant was founded on a supposed analogy to the rule of equity, which gives the vendor a lien on the estate for purchase-money remaining unpaid. If such a lien, it was argued, exists in equity, why is it not to be considered as also existing at law? This argument, however, is rather plausible than sound; there is no resemblance between the lien contended for in this case, and the equitable lien of a vendor for his unpaid purchase-money. The equitable right of the vendor is inaccurately described by the word "lien," if that word is to be understood in its legal acceptation, which always implies possession by the party setting up the lien of the thing on which it exists; the legal principle in such case being, that the party having rights which in good conscience he may enforce, and which are more or less connected with the thing of which he has possession, shall not be compelled to part with his possession till those rights are satisfied. But the vendor's right in equity is altogether independent of his possession of the land, or of the deeds. He has what, though called a lien, is in truth an equitable charge on the land, and which in general he may

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(a) 3 B. & C. 229.

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enforce in the same way as any other equitable mortgage. It is not necessary to pursue this part of the subject further, than to say that it affords no analogy which would warrant us in sustaining the legal right contended for.

On these grounds, therefore, considering that the plaintiff is the legal owner of the land, is *primâ facie* entitled to the deeds, and that no legal ground is stated in the plea which will warrant the defendant in withholding them, we think there must be

Judgment for the plaintiff.

June 30.

SOUTHEE v. DENNY.

A declaration stated that the plaintiff was a surgeon and accoucheur, and in that character had attended one R. during her confinement; that the defendant, in a discourse which he had with R., of and concerning the plaintiff, and of and concerning the plaintiff in relation to his said profession and business, spoke of and

concerning &c., the following words:—"I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he is a bad character; none of the medical men here will meet him. There have been many inquests had upon persons who have died because he attended them." The defendant pleaded not guilty. At the trial the latter words, as to the inquests, were not proved, but the words proved were, "several have died that the plaintiff had attended, and there have been inquests held on them." The judge amended the declaration accordingly, and a verdict was found for the plaintiff:—*Held*, on motion for a new trial, that the judge was justified in making the amendment; also, that the words as amended were actionable, without the aid of any inuendo to explain them by reference to extrinsic circumstances.

Semble, that the words, "he is a bad character, none of the medical men here will meet him," alone were actionable, as importing the want of a necessary qualification for a surgeon in the ordinary discharge of his professional duties.

and the plaintiff, being such surgeon and accoucheur as aforesaid, had been retained and employed as such surgeon and accoucheur, to attend, and had attended, as such surgeon and accoucheur, the said Isabella Reay upon the occasion of the said confinement, and had delivered the said Isabella Reay of the said child with skill, credit, and reputation. Yet the defendant, well knowing the premises, but contriving, &c. to injure the plaintiff in the way of his said profession and business of a surgeon and an accoucheur, heretofore, to wit, on &c., in a certain discourse which the defendant then had with the said Isabella Reay, of and concerning the plaintiff, and of and concerning the plaintiff in relation to his said profession and business, in the presence and hearing of the said Isabella Reay, and of one Isabella Wilkinson, and of divers other persons, then, in the presence and hearing of the said Isabella Reay and Isabella Wilkinson, and of the said other persons, falsely and maliciously spoke and published, of and concerning the plaintiff, and of and concerning the plaintiff in relation to his said profession and business of a surgeon and accoucheur, the false, scandalous, malicious, and defamatory words following: (that is to say,) I (meaning the defendant) wonder that you (meaning the said Isabella Reay) had him (meaning the plaintiff) to attend you, (meaning the said Isabella Reay, and meaning the attendance on her, the said Isabella Reay, in her confinement). Do you (meaning the said Isabella Reay) know him (meaning the plaintiff); he (meaning the plaintiff) is not an apothecary, he (meaning the plaintiff) has not passed any examination, he (meaning the plaintiff) is a bad character, none of the medical men here (meaning the said town of Cambridge) will meet him, (meaning the plaintiff); [there have been many inquests had upon persons who have died, because he (meaning the plaintiff) had attended them, (meaning the plaintiff's attendance on the said last-mentioned persons in the way of his said profession and busi-

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ness)]. By means of the committing of which said several grievances the plaintiff hath been and is greatly injured in his good name, fame, credit, and reputation as such surgeon and accoucheur as aforesaid, &c. (No special damage was stated.)

Plea, not guilty.

At the trial, before the Lord Chief Baron, at the Cambridge Spring assizes, 1847, the part of the declaration within brackets was not proved, but the words proved to have been spoken were : " Several persons have died that Mr. Souther (the plaintiff) had attended, and there have been inquests held on them." The plaintiff's counsel applied to the learned judge to amend the declaration, by substituting the latter words. The defendant's counsel opposed the application, on the ground that the proposed amendment could not be made under the 3 & 4 Will. 4, c. 42, s. 23, since it was not " in a matter not material to the merits of the case." It was also urged, that, if the amendment were made, the words would not be actionable without proof of special damage. The Lord Chief Baron made the amendment, reserving the propriety of it for the consideration of the Court, and he ruled that the words amended were actionable without proof of special damage. The jury having found a verdict for the plaintiff, with £50 damages,

Andrews, in last Easter Term, obtained a rule to shew cause why the verdict should not be set aside, and a new trial had ; against which

Naylor (*Byles*, Serjt., with him) shewed cause (June 21).—If the amended portion of the declaration were altogether struck out, the other slanderous expressions would support the verdict. It is actionable to say of a surgeon and accoucheur, that " he is a bad character, none of the medical men here will meet him," for those words necessarily

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import that he is unfit to exercise his profession. [*Parke, B.*—There was formerly a notion, that, if the words necessarily tended to injure a man in his profession, they were actionable; but in the case of *Doyley v. Roberts (a)*, the Court of Common Pleas held that the slander must be spoken of the plaintiff in relation to his professional conduct. There was a similar decision by the Court of Queen's Bench, in the case of *Ayre v. Craven (b)*.] The statement that "no medical man would meet" the plaintiff directly affects his professional practice, for it follows that he must be in the judgment of other professional men unfit to act as a surgeon.

Andrews, in support of the rule.—The learned judge had no power to make the amendment. The object of the 3 & 4 Will. 4, c. 42, s. 16, was to prevent parties from being defeated by mere technical variances; and that statute only empowers the judge to amend in matters "not material to the merits of the case, and by which the opposite party could not be prejudiced." This amendment was both material to the merits of the case, and also prejudiced the defendant in the conduct of his defence. [*Parke, B.*—The real merits of the case were, whether the defendant had been guilty of slander.] The words as they originally stood could not have been justified, but the defendant might have pleaded a justification to the words as amended. [*Parke, B.*—If the amendment was calculated to prejudice the defendant, the learned judge might have postponed the trial, but no application was made to him for that purpose. Suppose, however, the amended words struck out of the declaration; do not the remainder import such a defect of character as to support the verdict?] The words "he is a bad character, no medical man will meet him," do not necessarily refer to his character or conduct as a surgeon. If the same words were spoken of a clergyman, could it be said that they im-

(a) 3 Bing., N. C., 835.

(b) 2 Ad. & E. 2.

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puted misconduct in his office? In *Lumby v. Allday* (a), the declaration stated, that the plaintiff was clerk of a gas company, and that the defendant spoke of him these words: "You are a fellow a disgrace to the town, unfit to hold your situation, for your conduct with whores," and it was held that the words were not actionable. [*Parke*, B.—Here the plaintiff is himself a medical man, and it is said others will not meet him. If the words had been, no medical man will meet him *professionally*, could there have been any doubt about it? *Alderson*, B.—The context clearly shews that the words impute misconduct in his professional capacity.] In *Doyley v. Roberts* the jury expressly found that the words spoken had a tendency to injure the plaintiff, morally and professionally. [*Parke*, B.—The present case may be distinguished from that, because it is part of the business of a medical man to consult with other medical men in cases of difficulty: so that, if a medical man cannot have the benefit of the advice and assistance of others, no one will employ him.]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—On the trial of this case, which was an action for slander, the Lord Chief Baron directed an amendment; and a rule nisi for a new trial having been granted, the propriety of that decision has been discussed. We think that the amendment was proper, under the circumstances, and that the rule must be discharged.

The declaration stated that the plaintiff was a surgeon and accoucheur; that, in that character, he had attended one Mrs. Reay during her confinement, and that the defendant, in a discourse which he had with her, of and concerning the plaintiff, and of and concerning the plaintiff in

relation to his said profession and business, spoke of and concerning, &c., certain false, scandalous, and defamatory words, with proper innuendoes to connect them with the plaintiff, viz. "I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he is a bad character: none of the medical men here will meet him. There have been many inquests had upon persons who have died *because* he attended them," (meaning the said plaintiff's attendance in the way of his said profession and business).

On the trial, the latter words, as to the coroner's inquests, were not proved, but the words used appeared to be, "Several have died that the plaintiff had attended, and there have been inquests held upon them."

The counsel for the plaintiff applied to the Lord Chief Baron to amend. The defendant's counsel objected, on the ground that the variance was not of the description contemplated by the 3 & 4 Will. 4, c. 42, since it was not "in a matter not material to the merits of the case," for there was a substantial difference between the words alleged and those proved to have been spoken; and it is since argued before us that he might have justified the words as proved, though he could not those contained in the declaration.

The amendment being made, Mr. *Andrews*, on the part of the defendant, contended before us that the words were still not actionable, and that, as the Lord Chief Baron in his summing up had ruled that they were actionable, the defendant was entitled to a new trial.

It was doubted whether the Lord Chief Baron had so summed up; but from the notes of counsel it would appear that he was understood to have so done, and that the jury probably gave damages on that supposition.

We think that the Chief Baron was well justified, both in making the amendment and treating the words amended as being actionable.

As to the amendment, the variance was *material*, no

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doubt, in one sense, that is, it prevented the plaintiff from recovering for that part of the words spoken; but it was such as the judge might properly deem to be immaterial to the merits of the case, that is, to the real dispute whether words had been uttered imputing to the plaintiff the sort of want of skill, care, and professional qualities contained in the allegation in the declaration—the precise words being immaterial. In this sense the variance was immaterial to the real question, for the words spoken did really imply the same sort of slander as there alleged and positively expressed. And we also think it was one which the Chief Baron might well decide to be such as could not prejudice the defendant in the conduct of the defence, and therefore could direct to be amended immediately; for, as the defendant did not plead a justification to the words alleged, he might be reasonably expected not to be able to justify the words as amended; for, in truth, they import, when read in connection with the others spoken, the same slander, or at least a similar case differing only in degree; and as we are informed by the Lord Chief Baron that no request was made by the defendant's counsel to postpone the cause, to enable him to plead a justification to the words actually used, we think that the Chief Baron was justified in making the amendment instant.

The words as amended, without the aid of any innuendo to explain them, by reference to extrinsic circumstances, are, in our judgment, actionable; for their plain and obvious meaning, when taken together, imputes to the plaintiff a want of proper qualification for his profession or business of surgeon and accoucheur. The words, which are to be assumed for this purpose to be false and malicious, begin with an expression of an opinion that the plaintiff was an unfit person to attend Mrs. Reay. The defendant then proceeds to state that the plaintiff is a bad character, in such a sense as to render him, in the judgment of his professional brethren, unfit to meet them, so that he is a per-

son who, in a case of necessity, requiring a consultation with others, could not obtain the benefit of their assistance for his patients; and we should incline to think that these words alone are actionable, for they do import a want of a necessary qualification for a surgeon in the ordinary discharge of his professional duties. But the remaining words are, in our opinion, actionable; for, according to their ordinary sense, and when used as a reason for the opinion of the speaker that the plaintiff was unfit to be employed, they do obviously import that the plaintiff was so deficient in skill or care, as that he had either caused his patients to die, or at least that coroner's inquests had been held, in which the inquiry had been whether he had not been the cause of the death of many persons.

We follow the rule laid down by Lord *Ellenborough* in *Woolnoth v. Meadows* (a), in which words as little definite, importing a charge of crime, were held actionable, because, without the aid of any innuendo, they did in their plain and obvious meaning import it.

Rule discharged.

(a) 5 East, 463.

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WALLIS v. SWINBURNE.

July 3.

DEBT for money paid, and on an account stated. Pleas, never indebted, and defendant's bankruptcy.

At the trial of the cause, before *Parke*, B., at the last Spring Assizes at Warwick, the following facts were ad-

Where the plaintiff, the defendant, and another person were co-sureties for A. by a joint and several promis-

sory note payable on demand, and the plaintiff paid less than his share before the defendant's bankruptcy, but subsequently more than his proper proportion:—*Held*, in an action by him for one-third of the sum paid, that the case was not within the 52nd section of 6 Geo. 4, c. 16, as the plaintiff was not a "person liable for" the bankrupt's debt, and therefore that he was entitled to recover the sum so claimed.

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mitted, for the purpose of ascertaining whether the plaintiff was entitled in point of law to recover his demand.

The plaintiff and defendant were co-sureties with another person for one Antrobus, by a joint and several promissory note for £200, payable on demand.

The defendant became bankrupt on the 8th of August, 1842, and the note was then due; before the bankruptcy the plaintiff paid £20, not being his share of the debt; after it he paid sums, amounting, with the previous payments, to more than his proportion, and he sought to recover in this action one-third of the amount so paid by him.

It was contended, on the part of the defendant, that the defendant was discharged under the 52nd section of 6 Geo. 4, c. 16, which enacts, that "any person who, at the issuing the commission, shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt (although he may have paid the same after the commission issued), if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor, as to the dividends and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof; or, if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail, as aforesaid, after an act of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed." His Lordship, however, was of opinion that the plaintiff was entitled to recover the amount of his claim, and directed a verdict to be entered for him, reserving leave

to the defendant to move to enter a nonsuit, if the Court should be of a contrary opinion.

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Waddington having accordingly obtained a rule,

Mellor shewed cause (June 18).—The question is, whether this case is within the 52nd section of 6 Geo. 4, c. 16. It is submitted that it is not, and therefore that the plaintiff is entitled to retain the verdict entered for him. If a surety pays part of a debt only, and less than his moiety, he cannot call upon his co-surety for re-payment; for no liability arises between co-sureties till one has paid more than his share: *Davies v. Humphreys* (a). In *Clements v. Langley* (b), the defendant, who was one of five co-obligors in a bond for the due payment of principal and interest for money borrowed by C., became bankrupt after a forfeiture had accrued by non-payment of interest, which, however, was subsequently paid. C. afterwards made default in payment of the principal, and payment was enforced from the four solvent co-obligors; and it was held, that the bankruptcy of the defendant was no answer to the action. In that case, *Denman*, C. J., says, “To graft upon this clause” (namely, the 52nd section) “the liability of one co-surety for another, on default made by the principal, which is attempted in the present case, would be going a length which, in my opinion, is not warranted.” *Littledale*, J., also says, “I cannot see how the plaintiff here could be considered a surety, or liable for the debt of the bankrupt. The co-sureties were not so for each other, but for the principal; and I think the statute contemplates the case where the bankrupt is the *principal debtor*.” And he also proceeds, “The decision in *Wood v. Dodgson* (c) (that solvent partners who had been compelled, after a dissolution, to pay the debt of a bankrupt partner

(a) 6 M. & W. 153. (b) 5 B. & Ad. 372. (c) 2 M. & Sel. 195.

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for which they were jointly liable at law, might prove for it against his estate) went a great way, but the doctrine here contended for would go still further." Now partners and co-sureties do not stand upon the same footing; the liability in the case of co-suretyship does not arise until one has paid more than his share; in that of partnership there is a liability when any payment is made. In *Aflalo v. Fourdri-
 nier* (a), *Tindal*, C. J., says, with reference to the case of a person discharging a partnership debt after a commission of bankrupt issued against his partner, "The solvent partner, if not properly a surety for his partner's share, because each is originally liable for the whole, yet may, with strict propriety, be called, as to the share belonging to his partner, a person liable for the debt of another, and in that character would be entitled to prove under the commission." The question now before the Court has already been decided in the case of *Ex parte Porter* (b); that case is expressly in the plaintiff's favour. The case of co-suretyship is not within the machinery of the act.

Waddington, in support of the rule.—This is a case falling within the principle of the statute. The authority of *Davies v. Humphreys* (c) is not disputed. It may be admitted that the plaintiff is not a *surety* for the debt of the defendant; but it is contended that, at the time of the bankruptcy, he was a "person liable" for the bankrupt's debt. This 52nd section, with the addition of the case of bail, is a re-enactment of the 8th section of the 49 Geo. 3, c. 121. Before the latter statute, a party liable for the debt of another could not prove for the debt, unless he had paid it before the bankruptcy of the principal. That statute was passed to remedy such an inconvenience. If a party is liable for the debt of another at the time of the

(a) 6 Bing. 306. (b) 2 Mont. & Ayr. 281. (c) 6 M. & W. 153.

bankruptcy, and pays the debt afterwards, he comes within the provisions of this act. In *Ex parte Porter* (a), it does not appear that the note was due before the bankruptcy; in the present case it was. In *Clements v. Langley*, as reported in *Neville & Manning* (b), *Patteson, J.*, says, "I was, in the course of the argument, struck with the analogy to *Wood v. Dodgson* (c); and I still think, that if the whole of the principal had been due, the case would have been within the 52nd section." That case does not decide the point as to co-sureties; that was not the question before the Court. In *Aftalo v. Fourdrinier* (d), the parties were partners, and it is difficult to distinguish any difference between partnership and co-suretyship; in both cases each party is liable for the debt of the other. In *Bassett v. Dodgin* (e), it was held that an accommodation acceptor was a person liable for the debt of the party accommodated; and *Tindal, C. J.*, in delivering the judgment of the Court, says, "In *Ex parte Lloyd* (f), Lord Chancellor *Eldon* holds expressly, that the acceptor for the accommodation of the drawer, though not surety, is a *person liable* within the act. And *Maule, J.*, in *Filbey v. Lawford* (g), says, "The debt must be a debt which the bankrupt could have been compelled to pay." In the present case the plaintiff was liable at the time of the bankruptcy, and therefore the case falls within the statute.

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The judgment of the Court was now delivered by

PARKE, B.—My brothers *Alderson*, *Platt*, and myself, before whom this case was argued, are of opinion that the

(a) 2 Mont. & Ayr. 281.

(b) Vol. 2, p. 279.

(c) 2 M. & Sel. 195.

(d) 6 Bing. 309.

(e) 9 Bing. 653.

(f) 1 Rose, 6.

(g) 3 Man. & Gr. 478.

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rule to enter a nonsuit must be discharged. The plaintiff sued the defendant for money paid; to which the defendant pleaded bankruptcy. At the trial before me at Warwick, all the facts were admitted. The plaintiff and defendant were co-sureties, with another, for one Antrobus, by a joint and several note for £200. The defendant became bankrupt on the 8th of August, 1842, and the note was then due; before the bankruptcy, the plaintiff paid £20, not being his share of the debt; after it, he paid sums amounting, with the previous payments, to more than his proportion; and he sought to recover one-third in this action. I was of opinion that he was entitled to recover, thinking that the case of co-sureties is not within the meaning of the 6 Geo. 4, c. 16, s. 52, but reserved the question, which has been since fully argued; and we all, after considering the arguments, and referring to the authorities, concur in that opinion.

The words of the section in question, which, with the addition of bail, is copied from 49 Geo. 3, c. 121, s. 8, apply to any person who is surety or liable *for the debt* of the bankrupt. It was properly admitted, on the argument, that the plaintiff in this case was not a *surety* for the debt of the bankrupt; but it was contended, that he was a person liable for the bankrupt's debt, by reason of the promissory note on which he, as well as the bankrupt, was indebted to the creditors, having become due before the bankruptcy. But the cases decided on the former statute have given a construction to these latter words, and shew that they were meant to apply to those cases in which there subsisted, at the time of the bankruptcy, a relation analogous to that of surety and principal between the person who is to prove and the bankrupt, and which, as between themselves, made the former liable for the debts of the latter. If a surety only had been mentioned, it might have been held that the statute applied only to those cases where the person was a surety by express contract with the creditor, but the words

"*liable for*" were added to embrace those cases where a person was the principal debtor, with respect to the creditor, but by agreement with the bankrupt the latter was to pay the debt, and so with respect to him he became a surety. This appears to be the explanation given by Lord Eldon of the intention of the framer of the act, from his observations in *Ex parte Young* (a), and *Ex parte Lobbon* (b); and the cases in which proof has been admitted by persons liable, and consequently such persons barred, have been all of that description:—in *Stedman v. Martinnant* (c), the acceptor for the accommodation of the drawer, who became a bankrupt; in *Wood v. Dodgson* (d), a retiring partner with whom his co-partner, the bankrupt, had contracted to pay all the partnership debts; in *Ex parte Young* (e), a partner who used his partner's name fraudulently for his own purposes; in *Ex parte Watson* (f), a solvent partner paying the whole of the partnership debts,—fall under the description of persons "*liable for*" the bankrupt's debt: the bankrupt being the principal debtor, in the two first cases by his express contract; in the third by his implied one, for the whole amount of the debt; and in the last for the bankrupt's share; for, as the Vice-Chancellor Leach said, "each partner is a principal debtor for his own share; and they are mutual sureties to the creditors for the shares of each other (f)." In *Ex parte Watson, in re Sheath* (g), the Vice-Chancellor lays down the same doctrine, that one partner is a surety for another; and he says that the principle is, that the surety may prove for such sum as the principal debtor *ought at the time of the bankruptcy* to provide; and therefore one partner may prove for the amount of the aliquot share of another: and upon the ground of each partner being surety for the other,

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(a) 3 V. & B. 40.

(b) 17 Ves. 335.

(c) 13 East, 427.

(d) 2 M. & Sel. 135.

(e) 2 Rose, 40.

(f) 4 Madd. 477.

(g) Buck, 455.

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rested the opinion of Lord Chief Justice *Tindal*, in *Affalo v. Fourdrinier* (a). In all these cases, the party is liable in the nature of a surety for what is, as between himself and the bankrupt, the bankrupt's debt, and for which *he at the time of the bankruptcy* ought to provide, by express or implied contract. But no case has gone beyond these, and extended the construction of the statute so as to include persons who are co-sureties for a debt due, not from the bankrupt, but from a third person. It is not correct to say that one co-surety is liable for the debt of another, *inter se, at the time of the bankruptcy*; the bankrupt at that time has not engaged with his co-surety to provide any part of the money; but the third party, the principal, has engaged with both to do so; and it is then quite a contingency whether the co-surety will be called on by the creditor to pay, or will pay more than his own share, and until then he has no claim on the bankrupt; and accordingly it has been so held by Mr. Justice *Erskine*, and the other members of the Court of Review, in the case of *Ex parte Porter* (b), in which case the note, in which all joined, was clearly due before the bankruptcy; but if it was not it makes no difference, as, where one person is really a surety for another for his debt, it has been held that he is within the clause, though the debt is not due, if it be *debitum in præsentis solvendum in futuro*: *Ex parte Lobbon* (c). In the previous case of *Clements v. Langley* (d), there are strong dicta to the same effect, though the case itself did not decide that a co-surety was not within the meaning of the clause in question.

Rule discharged.

(a) 6 Bing. 306.

(b) 2 Mont. & Ayr. 281.

(c) 17 Ves. 335.

(d) 3 B. & Adol. 372.

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INFORMATION by the Attorney-General. The first count stated, that before and at the time of the committing of the offences hereinafter mentioned, our lady the Queen was, and still is, seised in her demesne as of fee, in right of her crown of England, of and in a certain forest called Waltham Forest, within the county of Essex; and that our lady the Queen, and all her ancestors, Kings and Queens of England, and their assigns, have continually held and enjoyed the said forest, and the game of wild beasts and fowls of forest, chase, and warren, coming and arising of and from the said forest, and all rights, profits, privileges, liberties, and franchises appertaining thereto, without any disturbance, title, or claim, made or pretended thereunto, until the time of the committing of the offences hereinafter mentioned; and that our lady the Queen still of right ought to have and enjoy the said forest, and the said game, and the said rights, profits, privileges, liberties, and franchises, in as full and ample a manner as hath always been accustomed: That R. Hallett, of &c., on the 1st of January, A.D. 1845, and on divers other days and times afterwards, and before the day of exhibiting this information, at &c., without any lawful warrant, right, or title in that behalf, unlawfully erected and made, and caused to be erected and made, a high and wide fence, and dug and made a deep and wide

An information by the Attorney-General stated that the Queen was and still is seised in her demesne as of fee, in right of her crown, of and in Waltham Forest, and that she and all her ancestors, kings and queens of England, have continually held and enjoyed the said forest, and the game of wild beasts and fowls of chase and warren coming and arising of and from the said forest, and all rights, profits, privileges, liberties, and franchises appertaining thereto, without any disturbance, title, or claim made or pretended thereto, &c.; that the defendant, on divers days, un-

lawfully erected a high fence, and dug a deep ditch in and upon the soil of the said forest, to wit, upon and around 100 acres of land, being parcel of and within the said forest, and therewith inclosed the said 100 acres of the said forest, and encroached and usurped thereon, and separated the same from the residue of the said forest, and kept and continued the said fence, &c., whereby the Queen could not have and enjoy the said forest and the said game, and the said rights, profits, &c., in as full and ample a manner as she of right ought to have and enjoy the same, to the great injury and disturbance of the Queen in the said forest, to the great damage and destruction of the vert and venison of and in the said forest, to the disinherison of the Queen in the premises. Plea, that the said place in which, &c., was not, nor was any part thereof, parcel of, or within the supposed forest, modo et formâ:—Held, on demurrer, that the plea was good, since this was not an information of intrusion into *lands* of the Crown, but an information, in the nature of an action of trespass on the case, for the injury to the incorporeal right of forest, by interfering with the game.

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ditch, in and upon the soil of the said forest, to wit, upon and around divers, to wit, 100 acres of land, situate and being &c., and being parcel of and within the said forest, to wit, a fence of the height, to wit, of 8 feet, and of the width, to wit, of 6 feet, and a ditch of the depth, to wit, of 3 feet, and of the width, to wit, of 6 feet; and thereby and therewith enclosed a great part, to wit, the said 100 acres of the said forest, and encroached and usurped thereupon, and separated and divided the same from the residue of the said forest, and wrongfully and unjustly kept and continued the said fence so erected and made, and the said ditch so dug and made as aforesaid, and the said part of the said forest so separated and divided and encroached and usurped upon as aforesaid, for a long time, to wit, from thence hitherto, whereby and by reason of the premises, our lady the Queen cannot have and enjoy the said forest, and the said game, and the said rights, profits, privileges, liberties, and franchises in as full and ample a manner as she of right ought to have and enjoy the same, to the great injury and disturbance of our lady the Queen in the said forest, to the great damage and destruction of the vert and venison of and in the said forest, to the disinherison of our lady the Queen in the premises, and contrary to the laws in that behalf.

The second count alleged, that the defendant kept and continued upon the soil of the said forest a fence and ditch before then erected and made.

There were two other counts, which only varied from the former in stating that the Queen was "seised as of fee in right of her crown of England," omitting the words "in her demesne."

The defendant pleaded to each of the counts, that the said place in which &c. was not, nor was any part thereof, parcel of or within the supposed forest, modo et formâ.

General demurrer, and joinder.

The *Attorney-General* (*Welsby* with him), in last Michael-

mas Term (November 24), argued in support of the demurrer.—With the exception of the case of the *Attorney-General v. Brown* (a), no plea like the present can be found in any book of entries, or in any record of this Court. It is necessary to consider the information, and what is the meaning of the word “forest,” as to which the ancient writers have differed. Lord Coke says (b): “A forest doth consist of eight things, viz. of soil, covert, laws, courts, judges, officers, game, and certain bounds: foresta est nomen collectivum, and by the grant thereof the soil, game, and a free chase doth pass.” Manwood gives a different definition: he says (c), “And therefore a forest doth chiefly consist of these four things, that is to say, of vert, venison, particular laws and privileges, and of certain meet officers appointed for that purpose, to the end that the same may be better preserved and kept for a place of recreation and pastime, meet for the royal dignity of a prince.” Some difficulty might in consequence arise as to the allegation of seisin, and therefore the information has been framed in both ways, but in either view the same question will arise upon the plea. This information is in effect an information of intrusion; but, at all events, it alleges an encroachment either on an incorporeal hereditament, or on the soil of the Crown. [*Parke, B.*—It differs from the old form, in not stating that the title of the Crown is by record. The precedents in Lord Coke’s Reports (d) allege that the Crown is possessed by record, and the reason there assigned for requiring the defendant to shew title is, that the title of the Crown appears of record, and is stated in the information to be of record.] This case must be considered as at common law, and not under the statute 21 Jac. 1, c. 14, s. 1. That statute enacts, “That wheresoever the king, his heirs or successors, and such from and under whom the king

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(a) 14 M. & W. 300.
 (b) 4 Inst. 289.

(c) Cap. 1, s. 2, p. 41.
 (d) 1 Rep. 16 b., 26 b.

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claimeth, and all others claiming under the same title under which the king claimeth, hath been, or shall be, out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements, or hereditaments, within the space of twenty years before any information of intrusion brought, or to be brought, to recover the same, that in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially." Under that statute, the defendant must either plead the general issue, and then the Crown would succeed upon proof of possession at any time within twenty years, or else the defendant must shew title in himself. This plea is not under that statute, but is, in truth, a *part* of the old plea of not guilty, as between subject and subject, viz. a plea of "not possessed." In the case of the *Attorney-General v. Ward* (a), the Attorney-General for Ireland, in argument, says, "Before the statute the defendant was obliged to plead his title specially; 4 Inst. 116. The case in Savile's Reports (b), which Comyns(c) cites as an authority for the general issue being pleaded before the statute, was not an information at the suit of the Crown, but of one John Heydon, and therefore does not apply. By the statute, the prerogative of the Crown has been remitted in only one case, viz. where there was a reasonable presumption that the party might stand upon his possession alone. The act gives a title by adverse possession alone, and in such case the party is not put to plead specially his title, which might prove defective, and thus be subjected to the risk of defeat on the very plea which the statute gave him: *The Attorney-General of the Prince of Wales v. St. Aubin* (d). Assuming the general issue to be a good plea, what does it put in issue? Every

(a) Hayes's Ir. Rep. 555.

(D. 74).

(b) Sav. 66.

(d) Wightw. 167, 236, per

(c) Com. Dig., "Prerogative,"

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avermment in the information, even the averment of a possession by the Crown within twenty years. If the Crown have been out of possession for twenty years, the defendant, under the general issue, will have an opportunity of shewing that fact, and thereby putting the Crown upon proof of title at the trial. If he fail in that, he evidently was not entitled to the benefit of the statute, and must therefore abide all the consequences of his pleading, as before the act passed." The learned Attorney-General is in error in stating that "not guilty" puts in issue every averment in the information. At common law two courses were open to a defendant: he might either have set up a *monstrans de droit* (a), or he might have pleaded "not guilty," which was in effect only "non intrusit." This plea denies the possession of the locus in quo. Its object is to raise the question whether the locus in quo has ceased to be parcel of the forest by reason of its inclosure by a subject. Now Manwood says, that all within the metes and bounds is part of the forest (b); but the effect of this plea is to put in issue the title of the Crown. The rule of prerogative pleading differs from that of pleading by the subject. Even if a defective title be stated, the Crown may abandon it and stand on its prerogative title, and compel the defendant to shew title: *Leigh v. Hudson* (c). In the case of *Rex v. The Bishop of Worcester* (d), Vaughan, C. J., says, "But it must be agreed there are cases in which the king may desert his own title, and not join issue upon the defendant's traversing the king's title or avoiding it, but traverse the title made by the defendant in his bar, which is directly taking a traverse upon a traverse, which regularly a common person cannot do; nor I think in any case, but where the first traverse tendered by the defendant is not material to the action brought, as in the case of waste in Long. 5 E. 4,

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(a) Co. Ent. 372, 377.

(b) Cap. 1, s. 1, p. 41.

(c) 2 Dyer, 238 b.

(d) Vaugh. 62.

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Digby v. Fitzherbert's case, and *Woodroffe v. Codford's case*, 37 Eliz., Hob. f. 105." Again (a):—"If the king be once seised, his highness shall retain against all others who have not title, notwithstanding it be found also that the king had no title, but that the other had possession before him, as appeareth in 37 Ass. p. 35, which is pl. 11, where it was found that neither the king nor the party had title, and yet adjudged that the king should retain; for the office that finds the king to have a right or title to enter, makes even the king a good title, though the office be false, &c. And therefore no man shall traverse the office unless he make himself a title; and if he cannot prove his title to be true, although he be able to prove his traverse to be true, yet this traverse will not save him." In *Norris v. Butler* (b), Manwood says, that an information of intrusion is a proceeding "to prove title for the Crown, and is in the nature of an inquisition, and not to try the right." The case of *Heydon v. Ware* (c) shews, that "not guilty" before the statute of James amounted only to non intrusit. If an information be exhibited in the Exchequer by a common person for the king, and the defendant pleads in bar and traverses the information, the king may traverse the matter of the bar if he pleases, and is not bound to maintain the matter contained in the absque hoc: *Rex v. Parker* (d). With respect to the difficulty which is suggested to arise from its not appearing that the title of the Crown is by matter of record, it is submitted that there is no such requisite in the case of a forest, for it can exist only by record. The allegation, that the Queen claims a forest, is equivalent to an allegation that she claims it of record. A forest can only be held by royal prerogative, of which the Court will take judicial notice. If the Crown grants a forest to a subject, it becomes a free chase. Forests were originally formed

(a) Vaugh. 64.

(c) Sav. 66.

(b) Sav. 4, case 10.

(d) Cro. Jac. 481.

by perambulations (a), the form of a record of which is found in 4 Inst. 302. [*Parke, B.*—In what way do you say the defendant ought to plead?] That he did not encroach; admitting the Queen's title.

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Willes, contra.—The definition of a “forest,” and of the purlieu of a forest, will be found in Com. Dig., tit. “Chase,” (A. 1), (A. 2), (I.). There are some places which, though within the ancient perambulations, may be no part of the forest as against the owner of the land; therefore, as against him, the Crown must shew not only an intrusion, but a “purpresture.” This information is ambiguous, and would subject the defendant to great difficulty, if he is compelled to plead otherwise than he has done. The old form of an information of intrusion appears from the case of *Alton Woods* (b). The present information differs from that in two respects; first, it does not shew title in the Crown; secondly, it does not *in terms* allege an intrusion. This information is for the disturbance of an incorporeal hereditament, which precludes the defendant from pleading his title. It is altogether different from an intrusion on lands, for if in this case the defendant shewed his title to the land, it would be no answer to the complaint in this information, which might be consistent with such title. The dicta of *Vaughan, C. J.*, in the case of *Rex v. The Bishop of Worcester*, are in favour of this view. As this information is framed, the defendant would, upon plea of not guilty, be put out of possession, as such plea would admit the title of the Crown. In *Burton's Exchequer Practice* (c) it is said, “The ancient course of the Exchequer hath been, that if, in an information of intrusion into lands or tenements, the defendant pleads ‘not guilty,’ he shall lose the possession. And it is said that the reason of this course is, first, that the King's title appeareth of the record,

(a) *Manwood*, 38.

(b) 1 Rep. 26 b.

(c) P. 401.

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and therefore the defendant may take knowledge thereof, and the rather for that, in every information of intrusion, it is specified of whose possession the lands &c. were: but if the defendant plead 'not guilty,' the King's learned counsel cannot know the defendant's title, to provide to answer the same, as the defendant may do to the King's title: 4 Inst. 116; Dyer, 7 Eliz. 238." Upon the plea of not guilty, either at common law or under the statute, the defendant would be precluded from giving evidence of title, if the Crown could shew a possession within twenty years. This therefore is the only mode in which the defendant could raise the question without setting out title, which he is not bound to do. There is a distinction between the title of the Crown to land and to such a possession as that of a forest. Of land the Crown has the ultimate reversion, in default of title in a subject; but the right of the Crown to a forest depends on statutes and charters. The reason why no precedent of such a plea can be found is, because the form of the information is novel.

The *Attorney-General*, in reply.—Under this plea it is impossible to say whether the defendant relies upon the defence of his title, or that the locus in quo is not within the purlieu of the forest, or that it has been disafforested. Either of those defences the Crown would have a right to traverse. The plea is calculated to mislead, and is also argumentative. Assuming that the defendant admits the title of the Crown to this part of the forest, he does so in such a way as to compel the Crown to prove the whole title, in order to shew the ambit of the forest. That the rule of law is the same as to land and incorporeal hereditaments, is evident from the recital in the statute of James, and the case of *Norris v. Butler*, which was an information for intrusion on *tithes*. The reason why an intruder is bound to shew title is, not that the Crown has a title as lord paramount, but because its title is of record, and so

known to all. The precedents in Coke's Reports are not for intrusion upon royal franchises.

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The judgment of the Court was now delivered by

PARKE, B.—(After stating the pleadings). The question which arises upon each of these four counts is the same. If this were an information of intrusion into the *lands* of the Crown, there is no doubt that all these pleas would be bad, for it is clear that a defendant in such an information cannot deny the title of the Crown; and he must shew title in himself if he pleads specially. On such an information, a defendant is supposed to be in possession of the *lands* claimed by the Crown, and he must maintain his possession, and shew it to be legal. But we cannot infer from any allegation in this information, that the Crown claims the soil of the locus in quo. The cause of action is ambiguously stated, and the information may be supported by evidence shewing the title to the soil itself, *or* that the encroachment was within the limits of the Queen's forestal rights. We have searched in vain for authorities in point upon this subject; nor can we find precedents for information of intrusion into a forest. It seems to us, after much consideration, that we cannot look upon this in any other light than as an information in the nature of an action of trespass on the case for the injury to the incorporeal right of forest, by interfering with the game; and if so, we find no authority for holding that the defendant is bound to plead title to the land which he uses in such a way as to be injurious to the game. We therefore think that our judgment must be for the defendant.

Judgment for the defendant.

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COOKE v. BLAKE.

To trespass for breaking and entering the plaintiff's close, the defendant pleaded,—1st, the user of a right of way for twenty years; 2ndly, a user of the way for forty years. Replication to the former plea, that the corporation of L., being seised in fee of the locus in quo, by indenture of feoffment demised

TRESPASS.—The declaration stated, that the defendant, on &c., broke and entered a certain close and yard of the plaintiff, situate in Liverpool &c., that is to say, a certain yard or close adjoining and belonging to a certain dwelling-house of the plaintiff, and communicating by a gateway with a street called Wood-street, in Liverpool aforesaid, and called and known as the Common-yard; and then, to wit, at the said several days and times, passed and repassed into, out of, over, and along the said close or yard, and obstructed and encumbered the said close and yard, and then ejected and expelled the plaintiff from the use, occupation, and possession of the said close and yard, &c.

it to H. for three lives and twenty-one years; that the corporation delivered seisin to H., who became and was seised of the said close during the period of twenty years in the said plea mentioned, and the said term so demised was existing in full force, and not expired, surrendered, or otherwise become void. The replication to the other plea stated, in similar terms, the demise of the locus in quo by the corporation of L. to H., and then alleged that H., being so seised of the locus in quo, by indenture between C. of the first part, H. of the second part, and M. and W. of the third part, granted to M. and W. a right of way over the locus in quo. Rejoinder to replication to first plea, that the said term so demised was not existing during the period of twenty years in that plea mentioned, *modo et formâ*. Rejoinder to replication to second plea, that H. did not grant to M. and W. the right of way, *modo et formâ*. At the trial, it appeared that the corporation of L., being seised in fee of the locus in quo, by indenture of the 17th February, 1800, demised it to H. for three lives and twenty-one years. By indenture of the 23rd July, 1803, after reciting the above indenture, H. assigned to C. the demised premises for securing payment of £1200, lent by C. to H. By indenture of the 9th February, 1804, after reciting the demise to H. by the corporation, the assignment by H. to C., and also reciting that H. had agreed to sell part of the land to M. and W. for a sum out of which the sum due from H. should be paid to C.; C., at the request of H., bargained, sold, assigned, and transferred, and H. granted, bargained, sold, assigned, and transferred to M. and W. part of the demised premises, together with the right of way in question. In 1812, H. died, having made his will, whereby, after bequeathing his estates to his wife for life, he devised the same, after her death, to J. and M., in manner following, "upon trust to pay and apply the rents, issues, and profits of the same to and for the life and benefit of my daughter Mary, and her assigns, during her life, and independent of her present or any future husband; and from and after the decease of my said daughter, I give, devise, and bequeath my real and leasehold estates as aforesaid unto and equally among all and every the children of my said daughter Mary, share and share alike, as tenants in common; and if the said Mary shall die without leaving lawful issue her surviving, then I give &c. the same to my grand-daughter Ann." In 1816, the wife of H. died, and, by indenture of the 11th December, 1817, the corporation of L. assigned to the trustees the reversion in fee-simple of the locus in quo.

Held, first, that the plaintiff was entitled to a verdict on the rejoinder to the replication to the first plea, since the trustees under the will of H. took only an estate during the life of the testator's daughter, and therefore the lease for lives did not merge in the grant of the reversion.

Secondly, that the rejoinder, "no granta pas," only put in issue the fact of a grant, and that the seisin of H. was admitted.

The defendant pleaded (with other pleas), thirdly, that for the full period of twenty years next before the commencement of this suit, the respective occupiers for the time being of a certain messuage, situate in the said parish of Liverpool &c., and adjoining the said close and yard, in which &c., actually had used and enjoyed, and were respectively accustomed to use and enjoy, as of right and without interruption, and still as of right and without interruption ought to have, use, and enjoy, a certain way for themselves and their servants to go, return, pass, and repass on foot from the said messuage towards, into, through, over, and along the said close and yard, in which &c., and from thence through the said gateway unto and into the said street, called Wood-street, in the said declaration mentioned, and so from thence back again from the said street, through the said gateway, towards, and unto, and into, and through the said close and yard, in which &c., unto and into the said messuage at all times of the year, at his and their free will and pleasure, as to the said messuage belonging and appertaining. And the defendant says, that during part of the said period of twenty years, to wit, at the said several times when &c., he was the occupier of the said messuage, and being such occupier, and having occasion, and being so entitled, to use the said way, did at the said times when &c., pass and repass in, by, through, and along the said way from the said messuage, into, through, over, and along the said close and yard in which &c., through the said gateway, towards and unto and into the said street, and so from thence back again, in, by, through, and along the said way, through the said gateway, unto and into the said messuage, using the said way there for the purpose and upon the occasion aforesaid, as he might for the cause aforesaid, and in so doing the defendant, at the said times when &c., a little obstructed the said close and yard &c., *quæ sunt eadem*. Verification.

The defendant pleaded also, fourthly, a similar plea of a user of the way for forty years.

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Replication to third plea.—That before the commencement of the said period of twenty years in the said third plea mentioned, and before any user of the said supposed right of way in that plea mentioned, and before and at the time of the making of the indenture next hereinafter mentioned, the mayor, bailiffs, and burgesses of the borough of Liverpool &c. were seised in their demesne as of fee of and in the said close and yard in which &c., and being so seised, heretofore, and before any user of the said supposed right of way in the said third plea mentioned, to wit, on the 17th February, A. D. 1800, by a certain indenture then made between the said mayor, bailiffs, and burgesses of the one part, and Thomas Herbert of the other part, (which said indenture having been lost by lapse of time, the defendant cannot produce the same to the Court here), the said mayor, bailiffs, and burgesses did demise, grant, let, and to farm let unto the said T. Herbert, his executors, &c. (amongst and with other hereditaments and premises), the said close and yard in which &c., to have and to hold the same, with the appurtenances, unto the said T. Herbert, his executors, &c., for the term of the several and natural life and lives of Mary Herbert, (daughter of the said T. Herbert), John Cukit, and John Audley Jee, and the life of the survivor of them, and for the further term of twenty-one years next after such survivor's decease, under the yearly rent and subject to the covenants and provisoes in the said indenture contained; and the said mayor, bailiffs, and burgesses then, to wit, on &c., delivered seisin of the said close and yard in which &c., to the said T. Herbert; by virtue of which said demise the said T. Herbert then became and was seised and possessed of the said close and yard in which &c., with the appurtenances, for the said term so to him thereof granted as aforesaid; that for and during the whole of the said period of twenty years in the said third plea mentioned, and at the said several times in the said declaration and third plea respectively mentioned, the said J. A. Jee, one of the lives men-

tioned in the said lease, was living, and the said term so demised and granted by the said mayor, bailiffs, and burgesses of and in the said close and yard in which &c., was existing, in full force, and undetermined, and not expired, surrendered, forfeited, or otherwise become void.—Verification.

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The replication to the fourth plea stated the grant of the locus in quo by the mayor, bailiffs, and burgesses to T. Herbert, as in the above replication, and proceeded thus: that T. Herbert, being so seised of the said close and yard in which, &c., and during the continuance of the said demise, to wit, on the 9th of February, 1804, by a certain indenture then made between one John Cukit of the one part, the said T. Herbert of the second part, and Thomas Morland and Josiah Williamson of the third part, (which said indenture being in the possession of the defendant, the plaintiff cannot produce the same to the Court here), the said T. Herbert did grant unto the said T. Morland and J. Williamson, their executors, &c., liberty of ingress, egress, and regress in, to, and out of the said close and yard in which &c., for and during the residue of the said term by the said last-mentioned indenture created and granted; that during a part of the said period of forty years in the said fourth plea mentioned, to wit, during ten years thereof, the respective occupiers of the said messuages in the said fourth plea mentioned had used and enjoyed the said liberty of ingress, egress, and regress, or right of way, for themselves and their servants to go, return, pass and repass on foot from the said messuage, towards, into, through, over and along the said close and yard in which &c., and from thence through the said gateway, unto and into the said street called Woodstreet, and so from thence back again from the said street through the said gateway, towards and unto the said close and yard in which &c., unto and into the said messuage, at all times of the year, at his and their free will and pleasure, as in the said fourth plea is in that behalf alleged, (being

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the said liberty of ingress, egress, and regress, or right of way aforesaid), under and by virtue of the said grant thereof by the said T. Herbert, and not otherwise.—Verification.

Rejoinder to replication to third plea.—That the said term so demised and granted by the said mayor, bailiffs and burgesses of and in the said close and yard, in which &c., was not so existing in manner and form as in the said replication mentioned, for and during the whole or any part of the said period of twenty years in the said third plea mentioned, modo et formâ.

Rejoinder to replication to fourth plea.—That the said T. Herbert did not grant unto the said T. Morland and J. Williamson, their executors, &c., liberty of ingress, egress, and regress into, through, and out of the said close and yard, in which &c., for and during the residue of the said term in the said indenture, in the said replication mentioned and granted, modo et formâ.

At the trial, before *Rolfe*, B., at the Liverpool Spring assizes, 1847, the following facts appeared:—By indenture of feoffment, dated the 17th February, 1800, the mayor, bailiffs, and burgesses of Liverpool, being seised in fee, demised certain premises, including the locus in quo, to T. Herbert, for the several lives of Mary Herbert, J. Cukit, and J. A. Jee, and the survivor of them, and for twenty-one years after the survivor's decease. Herbert took possession of the premises, and on the 23rd July, 1803, by an indenture between Herbert of the first part, and J. Cukit of the other part, after reciting the above indenture of the 17th February, 1800, Herbert "granted, bargained, sold, assigned, transferred, and set over" the demised premises to Cukit for the several lives of the said Mary Herbert, J. Cukit, and J. A. Jee, and for the life of the survivor, and for the term of twenty-one years from the death of such survivor, upon trust at any time to sell and absolutely dispose of the same for the purpose of raising and securing payment to Cukit of the sum of £1200, lent by Cukit to

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Herbert, with interest. No memorandum of livery of seisin was indorsed on this deed, and it was proved that Herbert had always been in possession of the premises. By indenture of the 9th February, 1804, between J. Cukit of the first part, T. Herbert of the second part, and T. Morland and J. Williamson of the third part, after reciting the indenture of the 17th February, 1800, and the indenture of the 23rd July, 1803, and also reciting "that there was then due to J. Cukit the principal sum of £1200, and that T. Herbert, with the consent of J. Cukit, had come to an agreement with the said T. Morland and J. Williamson, for the absolute sale and disposal to them of part of the premises demised to T. Herbert by the indenture of the 17th February, 1800, for the sum of £1500, out of which sum it had been agreed that the sum of £1200 should be paid to the said J. Cukit, and the residue to the said T. Herbert, it was witnessed, that in consideration of £1200 paid by the said T. Morland and J. Williamson to the said J. Cukit, by and with the direction and consent of the said T. Herbert, testified by his being made a party to and executing those presents, and also in consideration of the sum of £300 by the said T. Morland and J. Williamson paid to T. Herbert, he the said J. Cukit, at the request and by the direction and appointment of T. Herbert, testified as aforesaid, hath bargained, sold, assigned, transferred and set over, and by these presents doth bargain, sell, assign, transfer and set over, and the said T. Herbert hath granted, bargained, sold, assigned, transferred and set over, ratified and confirmed, and by these presents doth grant, bargain, sell, assign, transfer and set over, ratify and confirm unto the said T. Morland and J. Williamson, all that piece or parcel of land, &c., (being part of the premises demised to T. Herbert by the said recited indenture of lease), together with liberty of ingress, egress, and regress, in and through a gateway to the front of Wood-street, and a common yard behind the same, &c. To have and to hold the said piece or parcel of land,

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&c., with the appurtenances, unto the said T. Morland and J. Williamson, their executors, &c., as tenants in common, and not as joint tenants, from the day of the date hereof, for and during the term of the natural and several life and lives of the said Mary Herbert, J. Cukit, and J. A. Jee, and for the life of the survivor of them, and for the further term of twenty-one years next after such survivor's decease. In the year 1812 T. Herbert died, having on the 28th March, 1812, duly made his last will and testament, whereby, after bequeathing all his freehold and leasehold estates to his wife for her life, with a devise over of part, he devised the premises in question as follows:—"And I give, devise, and bequeath all the rest, residue, and remainder of my real and leasehold estates, from and after the decease of my said wife, unto William Field and William Moss, of &c., to hold to them and the survivor of them, his executors, administrators, and assigns, according to the respective estates, rights, and interests whereof I may be possessed of, in, and to the same respectively; upon trust to pay and apply the rents, issues, and profits of the same residue and remainder of my real and leasehold estates to and for the use and benefit of my said daughter Mary Jee, and her assigns, during her life, independent of her present or any her future husband; and from and after the decease of my said daughter Mary Jee, I give, devise, and bequeath all the said residue and remainder of my real and leasehold estates as last aforesaid, unto and equally among all and every the children of my said daughter Mary Jee, lawfully to be begotten, share and share alike, to take as tenants in common, and not as joint tenants; and if the said Mary Jee shall die without leaving lawful issue her surviving, then I give, devise, and bequeath such residue and remainder as aforesaid unto my grand-daughter, Mary Ann Shaw, her heirs, executors," &c. In the year 1816 T. Herbert's wife died. By indenture of the 11th December, 1817, between the mayor, bailiffs, and burgesses of Liverpool of the one part, and

William Field and William Moss, (the trustees named and appointed in and by the will of T. Herbert), of the other part, after reciting the indenture of the 17th February, 1800, also reciting that "the said W. Field and W. Moss, as trustees of the said late T. Herbert, were entitled to the said piece of land, &c., for the remainder of the said several terms of lives and years granted by the said indenture of lease, and that they had agreed with the said mayor, bailiffs, and burgesses, for the purchase of the reversion and inheritance in fee simple of and in the same, expectant on the determination of the said indenture of lease, it was witnessed, that in consideration of £532 to the said mayor, bailiffs, and burgesses, paid by the said W. Field and W. Moss, the said mayor, bailiffs, and burgesses granted, bargained, sold, aliened, released, and confirmed unto the said W. Field and W. Moss, as trustees as aforesaid, their heirs and assigns, all that the reversion in fee simple expectant, and to take effect in possession immediately from and after the determination of the several estates and terms for lives and years granted by the said recited indenture of lease, of and in all that piece or parcel of land," &c.; "to have and to hold the said reversion in fee simple so expectant as aforesaid, thereby granted and released, of and in the said hereditaments and premises, &c., unto the said W. Field and W. Moss, their heirs and assigns, to the only proper use and behoof of them the said W. Field and W. Moss, their heirs and assigns for ever, to the uses, upon the trusts, and to and for the several ends, intents, and purposes mentioned, expressed and declared in and by the last will and testament of the said T. Herbert, deceased, and for no other use, trust, intent, or purpose whatsoever." In the year 1830, Mary Jee, the daughter of T. Herbert, died.

It was submitted on behalf of the defendant, that the issue raised on the third plea ought to be found for him, because under the will of T. Herbert the trustees took the absolute legal estate in the premises demised, and conse-

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quently the lease for lives merged in the grant of the reversion. It was answered by the plaintiff's counsel, that the legal estate in the premises was limited to the trustees during the life of Mary Jee, and that upon her death the remainder took effect in her children. It was also urged by the defendant's counsel, that the issue raised on the fourth plea ought to be found for the defendant; first, because at the time of the supposed grant by Herbert to Morland and Williamson, Herbert had no estate in the premises; secondly, that on the face of the indenture of the 9th February, 1804, it was evident that Herbert did not purport to grant the right of way. On behalf of the plaintiff, it was contended that the replication admitted the seisin of Herbert, and that the fact of the grant was alone in issue. The learned judge directed a verdict for the defendant on both issues, reserving leave for the plaintiff to move to enter a verdict for him.

Knowles, in last Easter Term, obtained a rule nisi to enter a verdict for the plaintiff on those issues, or for a new trial. On the first point, he cited *Doe v. Simpson* (a), *Edwards v. Simons* (b), *Ackland v. Lutley* (c), *Adams v. Adams* (d).

Crompton shewed cause (June 22).—The issue on the third plea was properly found for the defendant. The question raised by the rejoinder to the replication to that plea is, whether the term granted by the mayor, bailiffs, and burgesses, to Herbert, by the indenture of feoffment of the 17th February, 1800, existed during the twenty years mentioned in the plea. That will depend upon whether the trustees under the will of Herbert took the absolute legal estate in the premises. If so, the term for lives created by the indenture of the 17th February, 1800, merged in the grant of the reversion to the trustees by the indenture

(a) 5 East, 162.

(b) 6 Taunt. 213.

(c) 9 Adol. & E. 879.

(d) 6 Q. B. 860.

of the 11th December, 1817. The language of the will is clearly sufficient to vest the absolute legal estate in the trustees. The testator devises "all the rest, residue, and remainder of his real and leasehold estates." Those words pass the fee simple. It is true that the devise is to the trustees and their executors; but it would have been improper to use the word "heirs" in the will, as that word is not found in the grant to Herbert. The purposes of the trust require that the trustees should take the absolute legal estate, and the true construction of the will is, that the children of Mary Jee took an equitable interest only.

The issue raised on the fourth plea was properly found for the defendant. The deed of the 9th February, 1804, did not operate as the grant of Herbert, for he had no estate in the premises, having conveyed all his interest to Cukit by the indenture of the 23rd July, 1803. [*Parke, B.*—If the title of Herbert is admitted by the rejoinder, the deed of 9th February, 1804, is the grant of Herbert. The question is, what is put in issue by non concessit?] It puts in issue not only the fact of a grant, but also the capacity of the party to make such a grant. In *Buddeley v. Leppingwell* (a), *Wilnot, J.*, says, "Non concessit puts the operation of the grant in question. If a man pleads a grant from the Crown under the great seal, and the other pleads non concessit, in this case the letters patent are confessed, but the effect and operation of them is denied: the effect of that issue of non concessit is, that the Crown had nothing in the land, or that the tenements did not pass by the letters patent. So in *Hynde's case*, in 4 Co. 71 b, and *Eden's case*, in 6 Co. 15 b, expressly." In *Taylor v. Needham* (b), the question was, whether the assignee of a lease could plead non demisit; and the Court distinguished the case of a stranger from that of a party or privy to the deed. *Mansfield, C. J.*, there says, "It is truly stated for the defendant, that, in cases of

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(a) 3 Burr. 1545.

(b) 2 Taunt. 278.

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a grant or feoffment, a stranger may plead "did not grant," or "did not enfeoff," and that plea denies not only the existence, but the efficacy of the supposed grant or feoffment. It brings in issue, therefore, the title of the grantor, as well as the operation of the deed, and that plea would be a proper plea to bring in issue the execution, construction, and efficacy, of any deed of demise." The law is correctly stated in a note to the case of *Rex v. The Inhabitants of Great Wakering* (a), where it is said, "Parties and privies to deeds indented are estopped from denying the operation of the instruments which they have thus solemnly authenticated. They can get rid of the effect of such instruments only by at once denying their legal existence by a plea of non est factum. Strangers, on the other hand, who are not bound by the estoppel, and are not presumed to be conversant of the operation of the deeds pleaded against them, are not bound, and are not even allowed to plead non est factum, but must plead according to the case—non concessit, H. 24 E. 3, fol. 37, pl. 2; P. 20 E. 4, fol. 1, pl. 4; *Hynde's case*, 4 Co. Rep. 71 b.;—non feoffavit, *Basset v. Prior of St. John of Jerusalem*, 18 E. 4, fol. 28, 29, pl. 27; M. 2 H. 6, fol. 2, pl. 1; *Moinell's case*, M. 10 H. 6, fol. 7, pl. 23; P. 28 H. 6, fol. 6, pl. 3; P. 12 E. 4, fol. 4, pl. 9;—non dedit, *Reme's case*, T. 38 E. 3, fol. 20; P. 2 H. 4, fol. 21, pl. 19; Dyer, 122 b.;—non demisit, Co. Litt. 47. b. This mode of pleading opens to both the litigant parties a wider field of inquiry than the precise issue raised upon non est factum. Thus the plea of non demisit puts in issue, not only the fact of the demise, but the capacity of the alleged lessor to make such a demise: Co. Litt. 47. b., *Taylor v. Needham*. So where the grant of a reversion or of a remainder is alleged, the adverse party pleading non concessit might (before 4 Anne, c. 16, ss. 7, 8) have shewn that the tenant for life had not attorned, though he might have traversed the at-

(a) 3 N. & M. 50.

tornment: Dyer, 31 a.; *Gourney v. Sir Edward Cleere*, Id. 31 b, in marg.; (but in *Hudson v. Jones* (a), it appears to have been held that the attornment is admitted, unless it be specially traversed); or that the grantor had nothing, or that nothing passed by the grant: *Eden's case* (b). So under non dedit pleaded to a gift in tail by deed, it may be shewn that the alleged donor had nothing in the land at the time of the supposed gift: *Martaine v. Hardy* (c). On the other hand, if an advowson be stated in pleading to have been granted by deed, and issue is taken upon the grant by a stranger to the deed, who pleads non concessit per factum, if it can be shewn that the grantor granted without deed, or by a different deed, it will be sufficient; per *Finchden*, J., H. 43 E. 3, fol. 1, pl. 4; Heath, Max. 80." The seisin of Herbert could not have been directly traversed, for where the words "virtute prætextu per quod," and the like, introduce a consequence or inference from the preceding matter, they are not traversable: 1 Wms. Saund. 23, n. 5. But the operation and effect of this rejoinder is, to raise an issue upon the fact of Herbert having done by the deed what he professed to do, which necessarily involves the question of his seisin. In *Eden's case*, which was an action of "trespass quare clausum fregit apud Marham in com' Norf', &c., the defendant pleaded, that the Queen was seised in fee in right of her crown, and by her letters patent under the great seal, bearing date at Weldhall, in com' Essex," &c., concessit tenement' præd' in quibus, &c., cuidam A. B. &c. The plaintiff took issue, quod non concessit tenement' præd' per prædictas literas patentes. And this issue was tried in the county of Norfolk, where the land lay, and not where the letters patent bore date, and the jury found for the plaintiff; and it was moved in arrest of judgment, that it ought to have been tried where the letters patent bore date; and non allocatur per Curiam, for the letters patent being matter of

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(a) 1 Salk. 90.

(b) 6 Rep. 15, b.

(c) Dyer, 122, b.

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record, shewed to the Court under the great seal, cannot be denied, nor can the party plead nul tiel record against them, being shewed under the great seal; and, therefore, the effect of the issue of *non concessit* is, that the Queen had nothing in the lands, or that the tenements did not pass by the letters patent, in which cases it shall be tried where the land lies, and so it was adjudged." Also in *Hynde's case* (a), the Court say, "So against the king's letters patent under the great seal, shewed in Court, none can deny them; but *non concessit per præd' literas patentes* is a good plea, for although there be such letters patent, yet perhaps nothing passed by them, and so per consequence *non concessit*." The different mode of pleading in a case like the present, and that of one claiming a lease for years by an elder grant, is pointed out in *Helyer's case* (b), where it was adjudged, that he who claims a lease for years by an elder grant, ought not to traverse the later grant, but the other party ought to traverse the elder grant, or shew how the grantor was enabled to make the second grant; otherwise in the case of a feoffment. In Co. Litt. 47. b., the same law is stated as to the effect of *non demisit*. The same doctrine is laid down in similar terms in *Stephen on Pleading*, 228 (c). [*Parke, B.*, referred to *Morris v. Dimes* (d).] The only authority against the position now contended for is that of *Cowlshaw v. Cheslyn* (e), where, to an action of trespass *quare clausum fregit*, the defendant pleaded that A. was seised in fee, and being so seised, granted a right of way by non-existing grant. The plaintiff replied traversing the grant, and the Court held, that on those pleadings it was not competent for the plaintiff to give evidence to shew that A. was not seised in fee, for the purpose of rebutting the presumption of the grant; but in that case, the old

(a) 4 Rep. 71.

(b) 6 Rep. 24, a.

(c) 5th edit.

(d) 3 N. & M. 671.

(e) 1 C. & J. 58.

authorities on this subject were not brought before the Court, and the judgment proceeded entirely on the question as to the *admissibility of evidence* to shew that the party had no power to make the grant. Here, however, the deed speaks for itself, and it is evident on the face of it that Herbert does not purport to make the grant. The deed recites the indenture of the 23rd July, 1803, by which Herbert assigned the premises to Cukit, thereby shewing that Herbert intended to convey his equitable interest only. Both the recitals, and the legal effect and operation of the deed, clearly point out that the grant was by Cukit and not by Herbert.

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Knowles and *Aspinall*, in support of the rule.—First, the estate for lives did not merge in the grant of the reversion to Herbert's trustees. The general rule is, that trustees take only such an estate as the nature of the trust requires. The object of the testator was to create a trust for the sole and separate use of Mary Jee. It was therefore necessary that the trustees should take the legal estate during her life, in order to enable them to pay to her the rents and profits of the estates devised. But upon the death of Mary Jee the trust altogether ceased, and the legal estate passed to the children. [*Rolfe*, B.—It would seem necessary that the trustees should have the legal estate for *some* time after the death of Mary Jee. Suppose, for instance, that rent became due on the 29th September, and Mary Jee died the day after, how is the rent to be recovered?] The same difficulty would have arisen in the case of *Edwards v. Symons* (a). There the testator devised a fee simple estate, expectant on the decease of B., to trustees, and their executors, to receive and apply the rents to the maintenance and advancement of six of the testator's children, till the youngest was twenty-one; and then to his said six children,

(a) 6 Taunt. 213.

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and the survivors and survivor of them, their heirs and assigns for ever, as tenants in common; and it was held that all such devisees as survived the testator, took, on his decease, a vested estate in fee in common. *Doe d. Budden v. Harris* (a) is also in point. There the testator devised his freehold estates to trustees, in trust to secure an annuity of £60 per annum to his wife for life; and then in trust for his two younger sons, and his two daughters, and all children to be begotten on the body of his wife, until they should severally attain the age of twenty-one years, and then unto and among them, share and share alike, as tenants in common, and not as joint tenants. The will then granted a power to the trustees to receive the rents, and to lay out the surplus beyond the wife's annuity, and other charges thereon, in good securities, to grant leases of the estates for a term not exceeding seven years, and "if they should think it advisable, to sell any part thereof *at any time after my death*;" and it was held, that this latter clause did not control the express gift of the estates to the children in fee, when they should severally attain the age of twenty-one years. [They were then stopped by the Court upon this point.]

The next question is, whether the deed of the 9th February, 1804, was the grant of Cukit or of Herbert. If the case of *Cowlshaw v. Cheslyn* (b) be law, it was the grant of Herbert, for the rejoinder admits his seisin, and the fact of the grant only is in issue. Cukit had no interest in the servient tenement, but only in the dominant tenement. The word "grant," which is essential to create an incorporeal hereditament, is used by Herbert alone. Unless, therefore, the deed operated as the grant of Herbert, no right of way was created by it. All that Cukit does is by way of bargain and sale, which is ineffectual to create an incorporeal right. The words "bargained, sold, assigned,

(a) 2 D. & R. 36.

(b) 1 C. & J. 58.

transferred, and set over," must operate on something then existing. By bargain and sale of land with *a way* to it, no way passes, for the bargain and sale conveys *a use* only, and there cannot be a use of what does not exist; but if a way be appurtenant to land by a lease of the land, the way passes to the lessee without any express grant: *Baudeley v. Brook* (a). It does not appear that Cukit took any estate under the indenture of the 17th February, 1800. That was a feoffment upon which no livery of seisin was indorsed, and it was proved that Herbert had always continued in possession. [Parke, B.—The question resolves itself into this, whether, upon a traverse of the grant of Herbert, it can be shewn that he had a defective title.] *Cowlishaw v. Cheslyn* (b) is expressly in point. That case does not conflict with the cases cited on the other side. In *Baddeley v. Leppingwell* (c) the replication traversed the alleged grant of the locus in quo by the lord of the manor, who was stated in the replication to be seised in fee; and upon that traverse the seisin in fee was not in issue, the matter in dispute being, whether the lord had admitted the proper person, which necessarily involved both the question of admittance and the right to admit. *Eden's case* (d) was decided on the ground that letters patent are matter of record, so that there could be no denial of the Queen's grant, unless she had no title to grant, and therefore in such case the effect of non concessit is, that the Queen had nothing in the land, or that the tenements did not pass by the letters patent. *Hynde's case* (e) proceeded on the same ground. Those authorities are for that reason distinguishable from the case of a traverse of a grant by an ordinary person. In *Morris v. Dimes* (f), the Court did not decide upon the present point. It is a rule of pleading, that every material allegation which is not traversed is so far admitted, that it is not competent

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(a) Cro. Jac. 189.

(b) 1 C. & J. 58.

(c) 3 Burr. 1534.

(d) 6 Rep. 15.

(e) 4 Rep. 71, b.

(f) 3 N. & M. 671.

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for the other party to disprove it: *Bonzi v. Stewart (a)*. Here the replication alleges the seisin of Herbert, and no traverse is taken upon it.

PARKE, B.—With regard to the first question, we are all of opinion that the estate of the trustees ceased on the death of Mary Jee. The gift over is by words as strong as those by which the property is given to the trustees. It is as if the testator had said, “I direct that the estate of the trustees shall cease on the death of Mary Jee, and I then give the corpus of the property to my children.” The result is, that the issue on the rejoinder to the replication to the third plea must be found for the plaintiff. With respect to the other point, we will take time to consider.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The only question which remained for consideration in this case was, how the issue ought to have been found on the rejoinder to the replication to the fourth plea.

That replication states, that the corporation of Liverpool were seised in their demesne as of fee of the locus in quo, and being so seised, by indenture between the corporation and Herbert, demised it to Herbert, and his executors, administrators, and assigns, for three lives and twenty-one years; that the corporation delivered seisin to Herbert, who thereby became and was seised and possessed of the locus in quo, and that Herbert, being so seised of the locus in quo, and during the continuance of the seisin, by indenture between Cukit of the first part, Herbert of the second part, and Morland and Williams of the third part, granted to Morland and Williams a right of way over the locus in quo.

The rejoinder to this replication is, that Herbert did not grant the right of way, modo et formâ.

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On the trial, the indenture was produced, which recited the demise to Herbert by the corporation; the assignment of the lease by Herbert to Cukit, by way of mortgage, to secure £1200; that Herbert had agreed to sell part of the land comprised in the lease to Morland and Williamson, for a sum, out of which the sum due from Herbert should be paid to Cukit; and, by the same indenture, Cukit, at the request of Herbert, bargained, sold, assigned, and transferred, and Herbert *granted*, bargained, sold, assigned, and transferred to Morland and Williamson part of the demised premises, together with the right of way in question.

Two objections were made by the defendant; first, that, at the time of the supposed grant, Herbert had no estate in the locus in quo, and therefore the grant did not operate as his grant; and, secondly, that on the face of the instrument itself, considering the recitals, Herbert did not purport to grant the right of way.

To this it was answered by the plaintiff, that the seisin of Herbert was admitted by the rejoinder, and the fact of the grant only was in issue, and that the indenture did prove, if the seisin was admitted, a grant by Herbert.

We intimated our opinion that, if the title of Herbert to make the grant was not in issue on the rejoinder of "*ne granta pas*," the grant in fact was proved by the indenture. So that the only question is, whether the title was in issue upon the replication denying the grant.

When, in a pleading, one of several material and traversable averments is denied, the others are admitted in that suit, (and indeed in others between the same parties, if the issue be found against the party traversing); and therefore, in a case in which it is averred that one was seised in fee at the time of the grant, and being so seised granted, the denial of the grant would seem to admit the seisin in fee; and this is the case of *Cowlshaw v. Cheslyn* (a), which

(a) 1 C. & J. 48.

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was rightly decided, unless there be some technical rule that, in *all cases*, the traverse of a grant puts in issue the power to grant. Mr. *Crompton* contended that it did; but the authorities cited do not support that position. In *Eden's case (a)*, the averment was that the Queen was seised, and granted by her letters patent under the great seal; and the traverse was, that she did not grant the tenements by the said letters patent; and it is stated by Lord *Coke*, that the letters patent being of record and shewn to the Court, cannot be denied; and therefore the effect of the issue non concessit is, that the Queen had nothing in the land, or that the tenements did not pass by the letters patent; and the same point was decided in *Hynde's case (b)*. This is a peculiarity belonging to grants from the Crown, by reason of their being made by matter of record. In *Baddeley v. Leppingwell (c)*, the denial of the grant of the lord of the manor, in the rejoinder, where the replication stated that he was seised in fee and granted to the plaintiff and another, was held not to traverse the admittance only, but the power to admit, from the nature of the copyhold tenure, for the admission is nothing without title. The traverse there admitted the seisin in fee of the manor, and put in issue the admittance, and the right of the lord so seised in fee to admit. Supposing the pleading had been of a surrender to the lord to the use of A. B., and a grant by him to A. B., the traverse of the grant would have put in issue the admittance only. Again, in *Taylor v. Needham (d)*, where Lord Chief Justice *Mansfield* says, that the plea of non demisit puts in issue the title, the declaration was on a quod cum demisisset; it did not state the seisin or title as a distinct fact. So it would be in an ejectment, if, instead of not guilty, non demisit were pleaded; the issue would include the title of the lessor. In *Mostane v. Hardy (e)*, it is said, that on a traverse of a lease for years

(a) 6 Rep. 15 b.

(d) 2 Taunt. 283.

(b) 4 Rep. 71 b.

(e) Dyer, 122 b.

(c) 3 Burr. 1535.

by parol, it was held, that the defendant might shew that the lessor had nothing in the land at the time of the demise. No doubt this was between lessor and lessee; and thus Litt., sect. 58, applies, where it is said the lessee may say that the lessor had nothing at the time of the lease, unless the lease be made by deed indented; and Lord Coke says (a), in his comment on this passage, he may plead that the lessor, "non demisit," and give in evidence the other matter. That the case in *Dyer* was a case between lessor and lessee may be collected from the comparison to a formedon, in which the tenant must plead non dedit, which puts in issue the title as well as the gift; and in declarations in formedon the seisin is not (commonly at least) averred: *Rastall, Formedon*, 362, &c. In the case there referred to in the Year Book, 43 Edw. 3, 19, pl. 3, in a writ of intrusion, where the seisin and lease of the ancestor were averred, the traverse allowed to be good was of the seisin, so that the case does not shew that, under the traverse of the lease, the title to the lease would have been in question. There is another case which has a most important bearing on this question. It is that of *Hudson v. Jones* (b). In replevin, the avowant made title by grant of a reversion expectant on an estate for life to the plaintiff, to which reversion the rent was incident, to which grant the plaintiff attorned: upon non concessit, it was a question whether the want of attornment could be proved; and it was urged, that, on that plea, the effect and operation of the grant was put in issue, and that the grant if ineffectual was void. But it was held that the attornment need not be proved; and the reason of the opinion was, because it was traversable, and what is not traversed is admitted, and the grant is perfect as far as the grantor can perfect it.

Upon the whole, therefore, we think that the case of

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(a) Page 47 b.

(b) Salk. 90.

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Coolishaw v. Cheslyn was rightly decided, and that, when the pleading states a title to demise or grant, and so gives an opportunity to the opposite party to traverse it, the traverse of the demise or grant does not include the title, but only the fact of the grant.

The case cited, however, does not precisely agree with that now under consideration, for there is no positive averment here that Herbert was seised in fee at the time of the grant. His title is derivative; it is deduced to him from the corporation of Liverpool, and he is said to have been thereby seised and possessed; and being so seised, and during the continuance of the demise by indenture, granted the right of way. The question therefore arises which the Court, in *Morris v. Dimes* (a), refused to decide.

We think, however, that the same reason applies to this case as to the supposed case of a positive averment of a seisin in fee at the time of the grant. By the traverse of the grant, the previous steps of the derivative title not being traversed are admitted, and supposing that the statement of Herbert's being so seised is not an averment that he was actually seised at the time of the grant, so as to be traversable, it is clear that he must be presumed to be so, the term continuing until the contrary is shewn by the defendant, by shewing that his interest had ceased in some way: *Bishop of Meath v. Marquis of Winchester* (b); and as there is no plea shewing this, the seisin of Herbert must be taken to continue to the time of the grant; and then the only matter in issue on the traverse of the grant is the grant itself. And, if this were not so, the effect of denying a grant, where it was made by a person having a derivative title shewn on the pleadings, from the owner in fee, would be the same as a denial of every previous step by which the title to lease is shewn.

(a) 3 N. & M. 671.

(b) 10 Bligh, 330; 4 Cl. & Fin. 445.

For these reasons we are of opinion that the issue on the rejoinder to this replication ought to be found for the plaintiff; and there must be a new trial, unless the counsel on both sides agree to have the verdict so entered to avoid further expense.

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Rule accordingly.

MASSEY, surviving Executor of AMES, deceased, v. JOHNSON
and Another, Executors of FOYSON, deceased.

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DEBT.—The first count of the declaration stated, that by an indenture made between Foyson of the one part, and Ames of the other part, Foyson, for the considerations

In an action of debt upon two indentures, whereby the defendant's testator cove-

nanted to pay the plaintiff the respective sums of £1300 and £700, with interest, the defendant pleaded, in substance, that the plaintiff was a mortgagee, by two mortgages, of an estate which was insufficient, upon an estimate of its value, to pay the mortgage money due from the testator; that three other mortgagees were in the same situation, the estate realised to each being less in estimated value than the charge upon it; that the defendants were devisees of the real estate, and executors of the deceased mortgagor; that they had received assets, which, after deducting the costs and expenses payable by them in the first instance, and in preference to the debts due from the testator, and also excepting some furniture, amounted to the deficiency on each mortgage; and thereupon it was agreed between the plaintiff and defendant, and each of the mortgagees, as the common consent of all, and at the request of each, that no suit should be instituted for the administration of assets, and that the said balance of the assets, after deducting the furniture, which should be given to the widow, should be divided rateably between the different mortgagees, and paid to them in satisfaction of the sums due to them over and above the estimated value of the estates; and that all the respective *rights and equities of redemption*, or other rights of the defendants, as executors and trustees to the mortgaged property, *should thenceforth be wholly barred, extinguished, satisfied, and discharged, and the mortgagees should thenceforth become absolute owners, both at law and in equity, of the mortgaged estates*, and that the covenants in the declaration should be satisfied and discharged in consideration of the premises. The plea then averred payment to each of his share of the assets, and that *the several rights and equities of redemption were barred and extinguished*. Replication, that it was not agreed, nor did the defendants pay to the plaintiff the sum of money in the plea mentioned, upon which issue was joined. The judge at the trial having ruled that the plea could not be proved, except by an agreement in writing. On motion for a new trial, and assuming, for the disposal of that question, that the plea, if proved, would be a good bar:—*Held*, that, though an agreement to convey an equity of redemption is not binding unless in writing, yet this plea would have been held good on demurrer, even if it had expressly stated that the contract was by parol; for the agreement by the plaintiff to forego the balance of his mortgage above the value of the estate, on receiving his share of the assets, was obligatory on him, and the receipt of that share a satisfaction for the estate, though there was no binding agreement on the defendants to convey the equity of redemption, for the agreement of the other mortgagees to take their shares also was a good consideration for giving up the claim for the residue of the debt against the defendants. Whether the plea, if proved, would be a good bar, *quære*.

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therein mentioned, covenanted with Ames to pay him £1300, with interest at 5 per cent., on the 27th August, 1823. Breach, non-payment.

The second count alleged, that by an indenture made between Foyson, of the first part; Lawes, Parkinson, both deceased, and the plaintiff, as executors of Ames, of the second part; and Staff, of the third part; Foyson, for the considerations therein mentioned, covenanted with Lawes, Parkinson, and the plaintiff, as such executors as aforesaid, to pay them £700, with interest at 4 per cent., on the 9th October, 1825. Breach, non-payment.

Plea.—That at the time of the making of the indenture in the first count mentioned, Foyson had a certain interest in certain hereditaments, that is to say, a power of appointment of the said hereditaments, and the fee-simple thereof, was vested in Foyson; and the said hereditaments, and the fee-simple thereof, were limited and assured to such uses as Foyson should by any deed executed by him direct, limit, or appoint; and in default of such direction, limitation, or appointment, and subject thereto to the ultimate use of Foyson: that the indenture in the first count mentioned was an indenture of mortgage, whereby in consideration of the sum of £1300 in the first count mentioned, lent by Ames to Foyson, at or before the making of the same indenture, Foyson, by virtue of and in exercise and execution of the power then vested in him in that behalf, did, by the said indenture by him duly executed as aforesaid, direct, limit, and appoint, that the said hereditaments should thenceforth go, remain, continue, and be unto the said Ames, his executors, &c., for the term of 1000 years, to be computed &c., subject, nevertheless, to a proviso or condition in the indenture contained, whereby it was provided, that if Foyson, his heirs, executors, &c., did pay or cause to be paid unto Ames the sum of £1300, with interest at 5 per cent., on the 27th August then next, without any deduction, &c., then, and in such case, the said term of 1000 years,

and the said appointment thereof, should cease and determine. (The plea then alleged, that Foyson made default in the payment of the sum of £1300, and interest.) That after the death of Foyson, and at the time of the making of the indenture in the last count mentioned, Foyson continued to have such interest as aforesaid in the said hereditaments, and such power of appointment as aforesaid, subject to the said term of 1000 years, and had a certain interest in the equity of redemption of the said hereditaments from the said mortgage. That the indenture in the last count mentioned was an indenture of further mortgage, whereby in consideration of the further sum of £700 also lent by the said Lawes, Parkinson, and the plaintiff, as such executors as aforesaid, to the said Foyson, at or before the making of the last-mentioned indenture, and also in consideration of the sum of 10*s.* paid by the said Staff to Foyson, at or before the making of the indenture, Foyson, by virtue and in execution of the power then vested in him in that behalf, at the request and by the direction of Lawes, Parkinson, and the plaintiff, as such executors as aforesaid, did by the last-mentioned indenture, duly executed as aforesaid, direct, limit, and appoint the said hereditaments; and the reversion thereof expectant on the determination of the said term of 1000 years should thenceforth go, remain, continue, and be to the use of Staff, his heirs and assigns, upon certain trusts in the said indenture contained; and did bargain, sell, assign, transfer, and set over unto Staff, his executors, &c., certain goods, chattels, fixtures, and effects, of the said Foyson, and all the right, title, and interest, property, claim, and demand, both legal and equitable, of him the said Foyson, therein and thereto, to have, hold, receive, take, and enjoy, the said goods, chattels, fixtures, and effects, unto the said Staff, his executors, &c., as his and their own absolute chattels and effects, upon the said last-mentioned trusts. (The plea here set out a power of sale upon trust, to retain expenses, and pay off the prior mortgage and

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interest, and afterwards to pay Lawes, Parkinson, and the plaintiff, the sum of £700, and interest.) That the covenant in the last count was a covenant in the last-mentioned indenture contained, to secure the payment to Lawes, Parkinson, and the plaintiff, as such executors, by Foyson, his heirs, executors, &c., of the sum of £700, and interest, so lent on the said last-mentioned mortgage security, on the 9th October then next. That from the time of the making of the last-mentioned indenture, until and at the time of the making of the accord and satisfaction hereinafter mentioned, Foyson during his life, and the defendants after his death, had a certain equitable interest in the equity of redemption of the said hereditaments, and of the said goods, chattels, and effects, subject to the said two several mortgage securities, and in any such surplus monies (if any) as aforesaid, as might arise from the sale by Staff, of the said hereditaments, and of the said goods, chattels, fixtures, and effects. That Foyson, in his lifetime, had a certain interest in certain other hereditaments, that is to say, that Foyson was seised in his demesne as of fee, of and in the said last-mentioned hereditaments; and Foyson, having the said interest in the said last-mentioned hereditaments, did by a certain indenture, sealed, &c., convey and assure unto one Aufrere, a certain estate or interest of and in the said last-mentioned hereditaments, by way of mortgage, for the purpose of securing to Aufrere the repayment of £900, with interest thereon. (The plea then set out a mortgage to one Wiley for £400, with covenant for payment; a mortgage to Lawes for £200, with the like covenant: it then stated, that Foyson was indebted to Johnson in £200, on a promissory note; and to Francis in £25, on an account stated for goods sold, and proceeded thus): That Foyson, at the time of his decease, was indebted to certain other persons in certain simple contract debts, and the defendants, as such executors, had incurred certain necessary and unavoidable debts and expenses in and about obtaining probate

of the said will, and in and about the funeral of the said Foyson, which said last-mentioned debts and expenses the defendants, as such executors, were lawfully entitled and bound to satisfy and discharge out of the goods, chattels, and effects of Foyson, at the time of his death in the hands of the defendants, as such executors, to be administered before the said mortgage debts, and before any other debts of Foyson; and after setting apart a sufficient sum out of the goods, chattels, and effects of Foyson, at the time of his death in the hands of the defendants, as such executors, to be administered, and applying the same in payment and satisfaction of the said necessary and unavoidable debts and expenses, there remained in the hands of the defendants, as such executors, at the time of the making of the accord and satisfaction hereinafter mentioned, goods, chattels, and effects, which were of the said Foyson deceased at the time of his death, of such a value as was sufficient to satisfy and discharge the said several mortgage debts due in respect of the said several covenants and indentures, to wit, of the value of £1042, and no more; and there were no other goods, chattels, and effects of Foyson at the time of his decease whatever, except the household furniture herein mentioned. That, after the death of Foyson and Ames, and in the lifetime of Lawes, it was estimated, as the truth and fact was, that the said hereditaments, so conveyed and assured by way of mortgage to Aufrere, and the said equitable interest in the same so vested in the defendants, were of less value than the said sum, to wit, £900 so secured by the said mortgage, to be paid to Aufrere, and all interest due thereon, by the sum of £300. That the said hereditaments, goods, chattels, fixtures, and effects mentioned in the said first and second indentures, and mortgaged as aforesaid to Ames and to Lawes, Parkinson and the plaintiff, and the said equitable interest in the same so vested in the defendants, were of less value than the said two sums of £1300 and £700 so secured by the said firstly

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and secondly mentioned indentures, to be paid to Ames and Lawes, Parkinson and the plaintiff, and all interest due thereon, by the sum of £500. (The plea then stated that the hereditaments mortgaged to Wiley, and the equitable interest in the same, were of less value than £400, and all interest then due thereon, by the sum of £133; that the hereditaments mortgaged to Lawes, and the equitable interest in the same, were of less value than £200 by the sum of £109, of which the plaintiff, Staff, Aufrere, &c., had notice.) And thereupon the defendants, as such executors as aforesaid, agreed with one another, and the plaintiff and Lawes, as such executors as aforesaid, and with Staff, and with Aufrere, and with Wiley, respectively, with the full knowledge and consent and at the request of each and every of them respectively, that the said several debts and covenants, and all damages accrued in respect thereof respectively, including the said debts and causes of action in the declaration, should be respectively satisfied and discharged by the arrangement, on the terms and in the manner following, (that is to say), that no suit should be instituted by the plaintiff and Lawes as such executors, or as such creditors as aforesaid, or by Staff or by Lawes, as such mortgagee or covenantee, or by Aufrere or by Wiley, or by all or any of them, for causing the goods, chattels, and effects, which were of Foyson at the time of his death, in the hands of the defendants as such executors as aforesaid, to be administered, but that the household furniture, parcel of the said goods, chattels, and effects which were of Foyson, deceased, at the time of his death, should thenceforth be taken, had, possessed, and enjoyed by the widow of Foyson, for her own use and benefit; that a sufficient part of the residue of the said goods, chattels, and effects which were of Foyson, deceased, at the time of his death in the hands of the defendants, as such executors, to be administered, should be set apart and applied by the defendants, as such executors, for and in the payment and

satisfaction of the said necessary and unavoidable debts and expenses; and the residue of the said goods, chattels, and effects, which then were estimated and admitted by the defendants, the plaintiff, Lawes, Staff, Aufrere, and Wiley, as the fact was, to be of the value of £1042, and no more, should be divided and distributed by the defendants as such executors as aforesaid, between and amongst the plaintiff and Lawes as such executors as aforesaid, the said Lawes as such mortgagee and covenantee, the said Aufrere and Wiley, in proportion to the respective amounts remaining due to each of them respectively in respect of their said respective debts, securities, and covenants, after deducting from the amount due for debt and damages, in respect of each of the said respective debts and covenants respectively, the estimated value estimated as aforesaid, of the respective hereditaments and premises so mortgaged as aforesaid, to each of them respectively, for securing the payment of the said respective debts as aforesaid, (that is to say), that £500, parcel of the said £1042, should be paid by the defendants, as such executors as aforesaid, to the plaintiff and Lawes, as such executors as aforesaid; and that £300, other parcel of the said sum of £1042, should be paid by the defendants, as such executors, to Aufrere, as such mortgagee and covenantee as aforesaid; and that £133, other part of the said sum of £1042, should be paid to Wiley, as such mortgagee and covenantee as aforesaid; and that £109, residue of the said sum of £1042, should be paid to Lawes, as such mortgagee and covenantee as aforesaid; and that all the respective rights *and equities of redemption*, or other right of the defendants, as such executors and trustees, or otherwise, of and in the said firstly mentioned hereditaments, and of and in the said goods, chattels, fixtures, and effects, and of and in the said surplus money, if any, to arise from such sale as aforesaid, of the said firstly mentioned hereditaments, goods, chattels, fixtures, and effects, or any of them, by the said Staff as aforesaid; and also of

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and in the said secondly mentioned hereditaments so covenanted and assured to Aufrere as aforesaid; and also of and in the said thirdly mentioned hereditaments so conveyed and assured to Wiley as aforesaid; and also of and in the fourthly mentioned hereditaments so conveyed and assured to Lawes as aforesaid, respectively, should be thenceforth respectively wholly barred, extinguished, satisfied, and discharged; and that the plaintiff and Lawes, or Staff as their trustee, should *thenceforth become and be the absolute owner, both at law and in equity*, of the said firstly mentioned hereditaments, goods, chattels, fixtures, and effects; and that Aufrere should thenceforth become and be the absolute owner, both at law and in equity, of the said secondly mentioned hereditaments; and that Wiley should thenceforth become and be the absolute owner, both at law and in equity, of the said thirdly mentioned hereditaments; and that Lawes should thenceforth become and be the absolute owner, both at law and in equity, of the said fourthly mentioned hereditaments; and that the said *two covenants in the declaration mentioned, and all debts and damages in respect thereof*; and the said covenant for payment to Aufrere of the said sum of £900, and interest, and all debts and damages accrued in respect thereof; and the said covenant for the payment to Wiley of the said sum of £400, and interest, and all debts and damages accrued in respect thereof; and the said covenant for payment to Lawes of the said sum of £200, and interest, and all debts and damages accrued in respect thereof, should, in consideration of the premises, be respectively satisfied and discharged. That, in pursuance and performance, according to the true intent and meaning of the said arrangement and agreement, no such suit in equity as aforesaid was instituted; and the said household furniture was taken, had, possessed, and enjoyed by the said widow of the said Foyson for her own use and benefit. (The plea then averred payment to the plaintiff and Lawes, as such executors, and

acceptance by them of the sum of £500, upon the terms aforesaid; also payment to Aufrere of £300, payment to Wiley of £133, and payment to Lawes of £109.) That the several rights and equities of redemption, and other rights of the defendants, as such executors and trustees as aforesaid, of and in the said several hereditaments firstly, secondly, thirdly, and fourthly above mentioned, and of and in the said goods, chattels, and effects, and of and in the said surplus, if any, to arise by sale thereof as aforesaid, became and were barred and extinguished; and in consideration thereof, and of other the premises aforesaid, each of the said several covenants, and all debts and damages accrued due in respect thereof respectively, became and were, by and with the said agreement and consent, and at the request of the plaintiff and Lawes, as such executors and creditors as aforesaid, and of Lawes, as such mortgagee and covenantee, and of Aufrere and Wiley, as such mortgagee and covenantee respectively, wholly satisfied and discharged, according to the true intent and meaning of the said arrangement and agreement. Verification.

Replication.—That it was not agreed, nor did the defendants pay to the plaintiff and Lawes, nor did the plaintiff and Lawes accept or receive of or from the defendants, the said sum of money in the said first plea mentioned, modo et formâ. Upon which issue was joined.

The cause was tried before the Lord Chief Baron, at the Norfolk Spring Assizes, 1847. At the commencement of the defendant's case the learned judge intimated his opinion that the agreement stated in the plea could not be proved unless it were in writing; and he inquired of the defendant's counsel whether there was an agreement in writing. Upon receiving a reply that there was not, the learned judge said that there was no evidence to support the plea, and directed a verdict for the plaintiff.

Andrews, in Easter Term, obtained a rule nisi to set

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aside the verdict and for a new trial, on the ground of misdirection, against which,

Fitzpatrick (*Byles*, Serjt., with him) shewed cause, (June 21).—The accord stated in the plea could not be proved by parol. The plea alleges an agreement, “that all the respective rights and *equities of redemption*” of the several mortgages “should be thenceforth wholly barred, extinguished, satisfied, and discharged, and that the mortgagees should thenceforth become absolute owners, both at law and in equity, of the mortgaged estates.” An equitable mortgage by the deposit of title-deeds to leasehold property is an “interest in land” within the proviso of the 2 & 3 Vict. c. 37, s. 1: *Hodgkinson v. Wyatt* (a). The words of that proviso are, “that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, on any estate or *interest therein*.” The language of the 4th section of the Statute of Frauds is stronger than that of the Statute of Victoria. It enacts (b), that no action shall be brought to charge any person upon any contract or sale of lands, tenements, and hereditaments, or any interest in *or concerning* them.” An equity of redemption is an interest in land within the meaning of that statute, and the agreement is altogether void: *Carrington v. Roots* (c). [*Pollock*, C. B.—The plea alleges that the money was paid to the several parties, and that there was an equitable division of the assets.] Part performance will not render available a contract void by the Statute of Frauds. It is true, that, in courts of equity, the doctrine has been that part performance dispensed with evidence of a written agreement. In the case of *Lord Guernsey v. Rodbridges* (d), which was decided in the 6th of Anne, the Lord Chancellor says, “Wherever a parol

(a) 4 Q. B. 749.

(b) 29 Car. 2, c. 3, s. 4.

(c) 2 M. & W. 248.

(d) Gilb. Eq. Rep. 3.

agreement is begun to be put in execution, and intended to be continued, though there be no writing, yet this Court shall enforce the execution thereof, notwithstanding the Statute of Frauds and Perjuries." Authorities to the same effect are collected in Viner's Abridg., tit. Contract and Agreement, (I.); but in all those cases there was either an admission on the record of part performance, or of some agreement, though not in writing, which the Court considered it a fraud to violate. It does not appear to have been the practice to plead the Statute of Frauds to a suit in equity: *Cooth v. Jackson* (a); and it would seem from the current of cases, that a court of equity did not look upon a suit in equity as an action within that statute. There is no legal doctrine to the effect that part performance will dispense with the requisites of the Statute of Frauds. *Whitbread v. Brockhurst* (b) will, probably, be cited as an authority to the contrary. There the Lord Chancellor says, "There are certainly cases which have considered an agreement, which has been partly executed, as never having been within the original view of the statute; and this has been a ground to induce the Court of King's Bench, as I am told, to determine this case to be entirely out of the statute." There does not appear to be any report of the decision alluded to; and it would seem, from the subsequent part of the judgment, that the Lord Chancellor doubted whether such a doctrine existed at law. The same point was before the Court of Chancery in the case of *Brodie v. St. Paul* (c), where *Buller, J.*, is reported to have said, "As to the part performance, courts of law have lately adopted the same sort of reasoning that prevails in this Court, that there can be but one true construction upon the Statute of Frauds. Whatever it is, it ought to hold equally both in courts of law and of equity; and that, as it

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(a) 6 Ves. jun. 16 a.

(b) 1 Bro. C. C. 404.

(c) 1 Ves. jun. 333.

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is settled in equity that a part performance takes it out of the statute, the same rule shall hold at law." [*Pollock*, C. B.—There is no foundation for any such doctrine, and you need not further argue that point.] The statute requires an agreement in writing; therefore the allegation in the plea must be taken to mean an agreement in writing, and no such agreement was proved.

The Court called on

Palmer, to support the rule.—The doctrine that part performance will take a case out of the Statute of Frauds is recognised in *Sugden's Vendors and Purchasers* (a), where it is said, "There are other cases taken out of the statute, not so much on the principle of no danger of perjury as that the statute was not intended to create or protect fraud." Among other instances, it is said (b), "So, where agreements have been carried partly into execution, the Court will decree the performance of them, in order that the one side may not take advantage of the statute to be guilty of fraud." The facts stated in this plea would entitle the defendant to relief in a court of equity, because the plaintiff having agreed to relinquish part of his claim in consideration of a similar agreement by the other creditors, it is a fraud upon the defendant to sue him on the mortgage-deed. The plea avers payment to each of his share of the assets; that is not traversed, so it appears that some parties to the agreement have got all they bargained for, and consequently there is a valid accord and satisfaction. The defendant is not the original debtor, but has merely the duty, as executor, of distributing the assets of the testator, and he might prefer any one debt of equal degree to another. In *Powell on Mortgages* (c), it is laid down, upon the authority of

(a) Vol. 1, p. 139.

(b) P. 140.

(c) P. 457.

(d) 2 Burr. 979.

Martin v. Mowlin (d), that the words "lands, tenements, and hereditaments, in a devise, do not include mortgages." A mortgagee without covenant or bond is a simple contract creditor, and the mortgage a security only: *Ancaster v. Mayer* (a). The agreement between the specialty and simple contract creditors, that each should give up a part of his claim, is a sufficient consideration to constitute a new contract binding on all: *Good v. Cheeseman* (b).

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Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B.—The only question in this case is, whether the plea, which is a very special one, could be proved without a note in writing. The defendant was stopped in the case by my Lord Chief Baron, upon the statement by the defendant's counsel, that he had not any such proof.

Upon attentively considering the allegations in the plea, we think that it might be proved by parol.

It is unnecessary to say, in this stage of the proceedings, whether the plea, if proved, would be a good bar. Accord and satisfaction is no bar to an action for a debt certain covenanted to be paid; but this plea is not meant to be one simply of accord and satisfaction; being in an action against executors, it is a sort of special plea of plene administravit, by an even division of assets, a part being given up for good consideration. We assume the plea to be good, for the purpose of disposing of the question, whether there should be a new trial.

The substance of the plea is this, that the plaintiff was a mortgagee by two mortgages of an estate which was insufficient upon an estimate of its value to pay the mortgage-money due from the testator; that three other mortgagees were in the same situation, the estate realised to each being

(a) 1 Bro. C. C. 465.

(b) 2 B. & Adol. 328.

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less in estimated value than the charge upon it; that the defendants were devisees of the real estate, and executors of the deceased mortgagor; that they had received assets which, after deducting the costs and expenses payable by them in the first instance, and in preference to the debts due from the testator, and also excepting some furniture, amounted to the deficiency on each mortgage; and thereupon it was agreed between the plaintiff and defendant and each of the mortgagees, as the common consent of all, and at the request of each, that no suit should be instituted for the administration of assets, and that the said balance of the assets, after deducting the furniture, which should be given to the widow, should be divided rateably between the different mortgagees, and paid to them in satisfaction of the sums due to them over and above the estimated value of the estates; and that all the respective rights and equities of redemption, or other rights of the defendants, as executors and trustees to the mortgaged property, should thenceforth be wholly barred, extinguished, satisfied, and discharged, and the mortgagees should thenceforth become absolute owners, both at law and in equity, of the mortgaged estates, and that the covenants in the declaration should be satisfied and discharged in consideration of the premises. The plea then avers the payment to each of his share of the assets, and that the several rights and equities of redemption of the defendant were barred and extinguished.

The issue raised by the replication was, that it was not agreed, nor did the defendants pay to the plaintiffs the sum of money in the plea mentioned. The averment, that the equities were barred and extinguished, was not in issue; and the question is, whether, on the traverse of the agreement, it was necessary to prove an agreement in writing by the defendants to convey or release their equity of redemption.

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It must be admitted, that no agreement to convey an equity of redemption would be binding unless in writing, because a court of equity treats the equity of redemption as the land itself—at all events as an interest in land; and if, in this case, it were essential to support the plea, that a binding agreement to convey the equity of redemption should be proved, the plea would have been held bad on demurrer for not stating the contract to be in writing, and, to make it good, a contract in writing must have been proved. But this plea would have been held good on demurrer, even if it had been expressly stated that the contract was by parol; for the agreement by the plaintiff, to forego the balance of his mortgage-debt above the value of the estate on receiving his share of the assets, would be obligatory on him, and the receipt of that share a satisfaction for the estate, though there was no binding agreement on the defendants to convey the equity of redemption; for the agreement of the other mortgagees, to take their share also, is a good consideration for giving up the claim for the residue of the debt against the defendants. Without such an agreement by all, the plaintiff and each of the other mortgagees would have had a right to sue the defendants to recover all the assets, which, in the proper course of administration, ought to have been paid to the specialty creditors. Each would have had his chance of recovering so much as would satisfy his debt, but the chance only, for the defendants might have paid one, or confessed judgment to one, and left the others totally or partially unpaid, according as the debt paid absorbed the whole or only a part of the assets. The giving up this chance by each of getting the whole is a good consideration for each agreeing to take less than the whole of the assets, and such a binding agreement of all, and actual payment of the share, is a good satisfaction of the whole. It would be so without any stipulation as to barring or extinguishing the equity of redemption; and it is

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not the less so with the addition of that stipulation, though it was not obligatory on the defendants. Indeed, in a plea of accord and satisfaction, the accord, generally speaking, is not obligatory. . Here the accord is composed partly of the obligatory agreement of each not to claim the whole of the assets, and partly of the non-obligatory agreement by the defendants to pay the debts and yield up the equity of redemption. The effect of it is this : the creditors bind themselves to take their share and give up the residue, if the defendants will pay the rateable share of each, and give up the equity of redemption ; and the plea avers this to have been done ; and the replication denies only the agreement of all, and the fact of payment. We think, therefore, that, in this case, there was no necessity to prove an agreement in writing, and certainly, from the form of the allegations in the plea, the pleader never meant to aver that there was one. The rule must, therefore, be absolute.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer).

PRATT and Others v. ASHLEY and Others.

June 18.

THE defendant having brought a writ of error on the judgment of the Court of Exchequer in this case (a), it was now argued (b) by

Insurance on ship at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there, for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places on either side of, and at the Cape of Good Hope. The ship sailed from Liverpool direct to a port in China,

Barstow, for the plaintiff in error.—The ship having gone to China and then to Manilla, had exhausted the permission given by the policy, and the going back again to China was a deviation. The authorities are collected in *Park on Insurance*, where it is said (c)—“These cases seem clearly to have decided, that where several termini are mentioned in a policy of insurance as the objects of the assured, those ports must be gone to in the order in which they are mentioned in the policy, otherwise the assured will be guilty of a deviation.” *Beatson v. Haworth* (d) is directly in point. That was an insurance on a ship “at and from Fisherow to Gottenburg and back to *Leith and*

having on board a cargo for that port and Manilla; from thence she proceeded to Manilla, and there discharged the remainder of her outward cargo. At Manilla, the captain took on board on freight 230 chests of opium, for Tongkoo, another port in China (not being thereby a tenth part laden), and sailed for Tongkoo, there to seek a freight for the United Kingdom, and on her voyage thither was lost by perils of the seas. Tongkoo is quite out of the direct course from Manilla to the United Kingdom.

Held, on error in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the words “from thence” in the policy, meant not “from Manilla” only, but “from ports or places in China and Manilla, all or any,” and that the sailing from Manilla to Tongkoo for the purpose of seeking a homeward cargo was not a deviation.

(a) 16 M. & W. 471.

and *Mawle*, J.

(b) Before Lord Denman, C.J.,

(c) Vol. 2, p. 627, 8th ed.

Patteson, J., Coleridge, J., Colman, J., Erle, J., Crenwell, J.,

(d) 6 T. R. 531.

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Cockenzie." It appeared that the ship, in the homeward voyage, went *first* to Cockenzie, which lay nearer to Gotenburg than Leith, and was stranded in the harbour of Cockenzie. That was holden to be a deviation; and the Court were of opinion that, unless there be some usage proved, or some special facts to vary the general rule, the party insured must go to the several places mentioned in the policy, in the order in which they are named. The principle of that decision was recognised and adopted in the case of *Marsden v. Reid* (a). That was an action on a policy on goods at and from Liverpool to Palermo, Messina, Naples, and Leghorn, provided the French should not be at Leghorn. The ship took in goods and was cleared out from Naples only, and had no goods for any other place—Leghorn being known to be in the hands of the French soon after the policy was effected. The ship was afterwards captured by the French in the Bay of Biscay, and, consequently, before the dividing point to any of the places mentioned in the policy. It was held that there was an inception of the voyage insured; and Lord *Ellenborough*, C. J., says—"I think that the voyage insured to Palermo, Messina and Naples, meant a voyage to all or any of the places named, with this reserve only, that if the ship went to more than one place, she must visit them in the order described in the policy." The case of *Hunter v. Leathley* (b) is relied upon by the other side. There the policy was effected upon goods in certain vessels, on a voyage "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Europe, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever, in the East Indies, Persia, or elsewhere, beginning the adventure from the loading thereof aboard the said ships as above." The ship took in part of her cargo at Batavia, then went to Sourabaya, another port in

(a) 3 East, 572.

(b) 10 B. & C. 858.

the East Indies, (not in the course of a voyage from Batavia to Europe, and not specified by name in the policy), and took in other goods, then returned to Batavia, whence she afterwards sailed for Europe, and was lost by perils of the sea. It was held by the Court of King's Bench, and that judgment was affirmed on error in the Exchequer Chamber, that the going to Sourabaya was not a deviation, and that the goods taken on board there were protected by the policy. That case, however, was decided on the particular language of the policy. *Tindal*, C. J., in delivering judgment in the court of error, says (a):—"But independent of the large and general words used in the description of the voyage, and the very extended powers given by the policy, the situation of the assured, and the circumstances under which it was effected, as they must be inferred from the policy itself, make it probable that a contract of the most open and comprehensive kind was intended to be effected." The particular terms of this policy do not create any exception to the general rule. The words relied upon for that purpose are, "*and from thence to her port or ports of calling and discharge in the United Kingdom.*" The words "*from thence*" refer to China or Manilla, whichever the ship might go to, but not to both. It is sought to insert in the policy the words "*backwards and forwards.*" Even if the ship had gone to Manilla in the first instance, she could not afterwards have gone to China.

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Martin, contra.—It is obvious that the parties contemplated an insurance upon a voyage outwards with a cargo, and homeward with a cargo. The intention was to insure the safety of the vessel during the period of the voyage to China and Manilla, during her stay there for any purpose, and from thence to her ports of calling and discharge in

(a) 5 M. & P. 472; 1 C. & J. 423; 7 Bing. 517.

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the United Kingdom. *Marsden v. Reid* (a) is an authority to shew that the ship might go to any ports and places in China and Manilla. If the ship had gone to Manilla, and had unloaded her cargo there, could it be said that she was bound to bring her homeward cargo from Manilla? "From thence" means "from all or any ports and places in China and Manilla." In *Hunter v. Leathley* (b), Lord Tenterden, in delivering judgment, says,—“The rule for the construction of marine policies is very well laid down by Lord Ellenborough in the case of *Robertson v. French* (c), viz., that they are to be construed according to their sense and meaning, as collected, in the first place, from the terms used in them; which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.” According to the strict grammatical construction of this policy, the ship was justified in going to Manilla for the discharge of her outward cargo, and from thence to any port or ports in China or Manilla for the purpose of acquiring her homeward cargo. The case of *Beatson v. Haworth* (d) is explained by *Marsden v. Reid*. The general principle of insurance law is not disputed; but each case must depend upon the words of the particular contract. *Lambert v. Liddard* (e) was an action on a policy “at and from Pernambuco, or any other port or ports on the coast of the Brazils, to London;” and the policy was held to warrant the assured, if he could not get a cargo at Pernambuco, to

(a) 3 East, 572.

(d) 6 T. R. 531.

(b) 10 B. & C. 858.

(e) 5 Taunt. 480.

(c) 4 East, 135.

go to any other port or ports on that coast till he got a cargo, not restricting him to those which lay in the direct course between Pernambuco and London. The same doctrine was laid down in *Metcalf v. Perry* (a) and *Bragg v. Anderson* (b).

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Barstow replied.

LORD DENMAN, C. J.—We are all of opinion that the Court of Exchequer has come to a right conclusion. The words “China and Manilla” are not to be construed as shewing the *order* in which the ship was to proceed, but must be taken as the district comprehending all the ports and places from which the vessel might take her homeward cargo. The judgment of the Court below will therefore be affirmed.

Judgment affirmed.

(a) 4 Campb. 123.

(b) 4 Taunt. 229.

HARVEY v. BRIDGES.

June 18.

THIS was an action of trespass for breaking and entering the dwelling-house of the plaintiff, and evicting the plaintiff and his family therefrom. The defendant pleaded *liberum tenementum*, and upon demurrer to the plea, the Court below gave judgment for the defendant (a). The plaintiff having brought a writ of error on that judgment, the case was now argued (b) by

Held, on error in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that *liberum tenementum* is a good plea to a declaration in trespass for breaking and entering a dwelling-house in the occupation of the plaintiff, and expelling him therefrom, although the premises are particularly described in the declaration.

entering a dwelling-house in the occupation of the plaintiff, and expelling him therefrom, although the premises are particularly described in the declaration.

(a) 14 M. & W. 437.

man, J., Erle, J., Cresswell, J.,

(b) Before Lord Denman, C. J.,

and Maule, J.

Patteson, J., Coleridge, J., Col-

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Miller, for the plaintiff.—In the course of the argument in the Court below, it was conceded that the plea of *liberum tenementum* is an anomaly, but the Court said, that it had been so long pleaded without objection, that it was now too late to overturn it. It is submitted, however, that it is not a good plea to a declaration framed like the present. The reason for allowing that plea was to compel the plaintiff to new assign, and describe the premises in which the trespass was alleged to have been committed with more particularity than he had done in his declaration. But where the premises are described by name and situation, as in the present case, there seems no ground for permitting such an anomalous plea.

At all events, the plea affords no justification for the forcible expulsion of the plaintiff and his family from the premises. The declaration states, that the plaintiff was in the actual possession and occupation of the premises, which must be taken to mean the legal occupation, and though the defendant might be tenant at will or by sufferance, and the plaintiff could determine such tenancy by entry, yet he has no right to expel the plaintiff by force. [*Patteson*, J.—It was formerly the practice to plead “as to the force and arms, and against the peace, &c.” not guilty, and as to the other part of the declaration a justification (a).] Where a declaration in trespass for pulling down a house stated, that the plaintiff and his family were actually residing in the house at the time, a plea by the defendant, a commoner, that the house interrupted his enjoyment of the common, and that therefore he pulled it down, was held bad. *Perry v. Fitzhove* (b).

Martin, for the defendant, was not called upon.

LORD DENMAN, C. J.—We have no doubt whatever that

(a) See *Lev. Ent.* 175, 178, 181; *Pl. Ass.* 485. (b) *Q. B., E. T.*, 1846.

the plea is good. I may observe that in the case of *Perry v. Fitzhove* great pains were taken to distinguish the case of a peculiar and articulate justification of all the acts charged to have been committed, from a case like that of *Taylor v. Cole* (a), where it was evident from the plea that there were no acts of violence, but the words used in the declaration were only those of the ordinary language of the law, stating a trespass committed with so much force as was necessary to change the possession.

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Judgment affirmed.

(a) 3 T. R. 292.

END OF TRINITY VACATION.

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GARWOOD v. EDE.

An allottee of shares in a railway company provisionally registered, paid a deposit of 2*l.* 12*s.* 6*d.* per share, and signed the subscribers' agreement, which gave the provisional directors power to carry on the undertaking or any part of it, or to abandon the whole or any part of it; and out of the monies which should come to their hands by way of deposit or otherwise, to make such deposits or investments as might be required by the standing orders of Parliament, and also to pay salaries, &c., and also the costs of obtaining acts of Parliament, &c., and generally to apply such monies in paying and satisfying all other costs, expenses, or liabilities which they might incur in relation to the undertaking. The scheme proved abortive, and the company was dissolved under the provisions of the 9 & 10 Vict. c. 28. In an action to recover back the deposit,—*Held*, that the plaintiff, by executing the deeds, had authorized the directors to dispose of the money, and therefore could not recover back any part of the deposit.

ASSUMPSIT for money had and received for the use of the plaintiff, and for money due on an account stated.—
Plea, non assumpsit.

At the trial before *Pollock*, C. B., at the London sittings after last Trinity Term, it appeared that the defendant was one of the provisional directors of a company, provisionally registered under the 7 & 8 Vict. c. 110, called "The Direct Western Railway Company;" and that the action was brought to recover the sum of 52*l.* 10*s.*, being the amount of a deposit of 2*l.* 12*s.* 6*d.* per share, paid by the plaintiff on the allotment to him of twenty shares in the undertaking. The deposit of 2*l.* 12*s.* 6*d.* per share consisted of the 10 per cent. allowed by the 23rd section of the above statute, to be received after provisional registration, and the residue, 2*l.* 10*s.*, was the amount of deposit required by the standing orders of Parliament. The plaintiff had received scrip certificates for his shares, and had

required by the standing orders of Parliament, and also to pay salaries, &c., and also the costs of obtaining acts of Parliament, &c., and generally to apply such monies in paying and satisfying all other costs, expenses, or liabilities which they might incur in relation to the undertaking. The scheme proved abortive, and the company was dissolved under the provisions of the 9 & 10 Vict. c. 28. In an action to recover back the deposit,—*Held*, that the plaintiff, by executing the deeds, had authorized the directors to dispose of the money, and therefore could not recover back any part of the deposit.

executed the "parliamentary contract," and also the "subscribers' agreement." This latter deed, which was between the shareholders, the provisional directors, and certain trustees, conferred very extensive powers on the provisional directors. Amongst others, it gave them "full power, in their absolute discretion, and at such times and in such manner as they should think fit, to carry the undertaking, or any part thereof, into effect, with any such variations, alterations, modifications, and extensions, as were thereby authorised, and to abandon the whole or any part of the said undertaking, and generally to regulate and manage the affairs of, or connected with, the undertaking, or otherwise concerning the said company or association; and for that purpose to cause such surveys and estimates to be made as they might think advisable, &c. And also from time to time to adopt, carry into effect, or vary any measures whatsoever which they might in their judgment consider necessary or expedient for obtaining an act or acts of Parliament in the next or any subsequent session of Parliament, for authorising the construction of the said intended railway or railways, or any part or parts thereof," &c. The directors were also to have "full power, out of the money which should come to their hands or be placed to their credit by way of deposit on payment of calls, or otherwise in relation to the said undertaking, to make such deposits or investments as might be required by the standing orders of Parliament; and also to pay and allow all such fees, salaries, commission, and recompense to servants and other persons who might be employed by them, &c., as they should think right; and generally to apply such monies in and towards the fulfilment and enforcement of any bargains, engagements, contracts, arrangements, resolutions or agreements, into which they might have entered, or into which they were, by that deed, empowered to, and should or might enter for all or any of the purposes aforesaid, &c., and towards the costs of any works or proceedings connected therewith, and in or

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towards the soliciting, supporting, or opposing a bill or bills in Parliament as therein mentioned, and in obtaining the necessary act or acts for carrying out the aforesaid undertaking or any part or parts thereof, or in bringing the merits of the said undertaking, or any part thereof, before Parliament as a project, and generally in paying and satisfying all other costs, charges, and expenses or liabilities, which they or any or either of them might sustain or incur, or which might have been already sustained or incurred in relation to the said undertaking, or otherwise in pursuance of, or by virtue of, or consistently with these presents, or in the execution or enforcement of the agreements, provisoes, and stipulations therein contained, or any or either of them."

The undertaking proved abortive in consequence of the requisite capital not having been raised, and in the year 1847 the company was dissolved under the provisions of the 9 & 10 Vict. c. 28. It was conceded that no fraud could be imputed to the directors, and that the whole amount of the deposits had been expended. On the part of the defendant it was submitted, that the case was distinguishable from *Walstab v. Spottiswoode* (a), inasmuch as the plaintiff had executed the "subscribers' agreement," which precluded him from maintaining the action. The Lord Chief Baron was of that opinion, and directed a verdict for the defendant.

Knowles now moved to set aside the verdict, and for a new trial.—It is conceded that the plaintiff is not entitled to recover back that portion of the deposit which was paid for the general purposes of the undertaking; but with respect to the 10 per cent. which was paid for a specific purpose, the directors had no power to apply it to any other purpose. [*Parke, B.*—The "subscribers' agreement" provides that the deposits may be applied in payment of *any*

(a) 15 M. & W. 501.

charges and expenses.] The shareholders must have intended to limit the power of the directors to that portion of the deposits which was raised by them for the general purposes of the undertaking. Their authority to receive the 10 per cent. depends upon the 7 & 8 Vict. c. 110, s. 23, which enables the directors of a company provisionally registered (amongst other things) to allot shares and receive deposits by way of earnest thereon, at a rate not exceeding 10s. for every £100, on the amount of every share in the capital of the intended company, and also in the case of companies for executing any railway, &c. which cannot be carried into effect without the authority of Parliament, in addition to and exclusive of such sum of 10s. per £100, such further sum per £100 on the amount of every such share as may be required by the standing orders of either house of Parliament, to be deposited before the obtaining of an act of Parliament for enabling the company to execute such work. It cannot be supposed that the shareholders would authorise the directors to dispose of the 10 per cent. in a manner in which it could not be legally appropriated. The subscribers' agreement must, therefore, be construed with reference to the provisions of that act, and as applying to that part of the deposit which was paid for general purposes only. [*Pollock*, C. B.—The execution of the deed has given the defendant a joint interest in the general adventure, and that distinguishes the case from *Walstab v. Spottiswoode*. There the purpose for which the money was paid wholly failed, and the plaintiff never was jointly interested with the defendant in the undertaking. Here the plaintiff has obtained his scrip on payment of the deposit, and has by deed entered into a new contract, whereby he became associated with the defendant in a common adventure.] It is submitted that the deed has not created a partnership. [*Alderson*, B.—Why may not any number of persons agree by deed to dispose of their own money? *Parke*, B.

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—Suppose the terms of the deed had been that the directors should receive the deposit of 10 per cent. in order that it might be paid in under the orders of Parliament, and that if the scheme was abandoned they should be at liberty to apply it in discharge of *any expenses*: that would have been perfectly legal.] The words of this deed are different. [*Parke, B.*—They amount very nearly to that: the directors are empowered to go on with the undertaking, or any part of it, and to employ the money which may come to their hands “in paying and satisfying all costs, charges, and expenses or liabilities, which they might sustain or incur in relation to the undertaking or otherwise, in pursuance of, or by virtue of, or consistently with those presents.” So that the effect of the agreement is, that if the undertaking went on, the money was to be deposited under the standing orders of Parliament, but if it failed, the directors were empowered to dispose of it in payment of any expenses. Consequently, there never was a time when this was money had and received by the defendant for the use of the plaintiff.]

Rule refused.

Nov. 8.

CLEMENTS v. TODD.

The plaintiff signed an application for shares in a railway company provisionally registered. The application contained the usual

ASSUMPSIT for money had and received by the defendant for the plaintiff's use. Plea, non assumpsit.

At the trial before *Pollock, C. B.*, at the Middlesex sittings after last term, it appeared that the action was brought

undertaking to sign the subscribers' agreement and parliamentary contract when required. The plaintiff had no letter of allotment, but having paid the deposit, received scrip certificates in the usual form, stating, that “the subscribers' agreement and parliamentary contract had been signed by the person to whom the certificate was issued.” The plaintiff, in fact, never signed either the subscribers' agreement or parliamentary contract. The scheme having proved abortive; in an action to recover back the deposit,—*Held*, that the plaintiff had placed himself in the same situation as if he had signed the subscribers' agreement and parliamentary contract, and could not recover.

to recover a deposit of 2*l.* 2*s.* per share on 500 shares in a railway company provisionally registered, and called "The Hull and Lincoln Direct Railway Company." The prospectus stated the number of shares to be 25,000. The defendant was one of the managing directors of the company, and the deposit was paid under the following circumstances:—The day after the parliamentary deposit was paid into the Bank of England, and the subscribers' agreement and parliamentary contract lodged at the Private Bill Office, the plaintiff came to the office of the company and signed an application for shares, containing the usual undertaking to sign the subscribers' agreement and parliamentary contract when required. There was no letter of allotment, but there was a minute in the company's books, that 500 shares were to be allotted to the plaintiff on payment of the deposit. The plaintiff paid the deposit, and a day or two afterwards received the scrip certificates, for which he gave the usual receipt. The plaintiff never signed the subscribers' agreement or the parliamentary contract, but the scrip certificate stated, that "The subscribers' agreement and parliamentary contract having been signed by the person to whom this certificate is issued for the number of shares mentioned therein, and a deposit of 2*l.* 2*s.* per share having been paid thereon, the shares have been registered in the company's books." The scheme ultimately proved abortive, only 13,000 shares having been subscribed for. The Lord Chief Baron left it to the jury to say, first, whether the scheme was a *bonâ fide* one, and honestly intended to be prosecuted; secondly, whether, when the plaintiff took the scrip, he intended to place himself in the same situation as if he had been an original subscriber. The jury found both questions in the affirmative, and a verdict was given for the defendant.

Watson now moved for a rule to shew cause why the verdict should not be set aside and a new trial had.—

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The directors were not justified in applying to Parliament until all the shares had been subscribed for. There is no evidence of any valid and binding contract. The plaintiff applies for shares in an undertaking, which was to have 25,000 shareholders, but only 13,000 shares were sold. The application for shares and the delivery of scrip certificates amount to nothing; and as the scheme ultimately failed, the case falls within the principle of *Walstab v. Spottiswoode* (a). [Alderson, B.—The plaintiff paid his money on the same terms as the persons who signed the deed.] Scrip certificates are a mere token, saleable in the market, and not evidence of a contract. [Rolfe, B.—The jury have found that the plaintiff is in the same situation as if he had signed something which, inter alia, precludes him from recovering. Parke, B.—There is evidence that the plaintiff put himself in the same situation as regards the defendant, as if he had signed the parliamentary contract.]

PER CURIAM.—It is clear there ought to be no rule.

Rule refused.

(a) 14 M. & W. 501.

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EGGINGTON v. CUMBERLEDGE.

Nov. 4.

ASSUMPSIT for work and labour as an attorney and solicitor, and on an account stated.

Pleas, non assumpsit, and that no signed bill had been delivered as required by the statute 6 & 7 Vict. c. 73, s. 37.

At the trial of the cause, before *Coleridge, J.*, at the last assizes at Stafford, it appeared that the plaintiff had been employed as local agent and attorney by the defendant, who was one of the provisional committee of "The Birmingham and Manchester Direct Railway Company." The defendant had attended meetings, and on several occasions had taken the chair, and had, in other matters, taken a share in the management of the scheme. At a meeting of the committee, at which the defendant was not present, in January, 1846, the general solicitor of the company was ordered to write to the plaintiff and request him to send his bill. This the solicitor accordingly did, and the plaintiff sent him his bill inclosed in a letter, which was received by him at his own residence. The bill was laid before the committee on the 13th of January, the defendant being then present, and on the 14th it was laid by the secretary before another meeting, when the defendant was not present. This action was brought in June, 1847. It was contended by the defendant's counsel, that these facts were not sufficient evidence of a delivery of the bill to satisfy the requisites of the statute. The learned judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to enter a nonsuit or a verdict.

In an action on an attorney's bill against a member of the provisional committee of a railway company, it appeared that the plaintiff, who was employed as local agent and attorney, sent his bill to the residence of the solicitor of the company, who laid it on one occasion before the committee when the defendant was present, and on another occasion it was laid before the committee by the secretary when the defendant was absent:—*Held*, a sufficient delivery of the bill within 6 & 7 Vict. c. 73, s. 37.

Whateley now moved accordingly.—The question is, whether the plaintiff's bill was delivered to the defendant. It is submitted that there was not such a delivery as the statute requires. The 37th sect. of the 6 & 7 Vict. c. 73, enacts, that no attorney or solicitor shall maintain any action

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for the recovery of his fees, &c., until the expiration of one month after such attorney or solicitor "shall have delivered *unto the party to be charged therewith*, or sent by the post to, or left for him, &c., a bill of such fees, &c." Here the bill was sent to the residence of the solicitor of the company, who had no authority from the defendant to receive it. The case of *Eicke v. Nokes* (a) is in the defendant's favour, and shews that the statute should be strictly followed. In that case a bill had been delivered at a particular place, which was not shewn to be the defendant's abode, and the bill was afterwards given to the clerk of the defendant's attorney, who attended the taxation of costs. Lord *Tenterden* said, "when an act of Parliament requires a particular thing, I must see that it is proved," and he nonsuited the plaintiff. [*Parke, B.*—The bill in the present case was laid before a meeting of these persons who were partners with the plaintiff, and it was in the possession of the secretary. *Alderson, B.*—In the case you cite, it did not appear that the bill came into the defendant's possession *a month* before the action was commenced; here the bill was laid before the committee upon one occasion when the defendant himself was present; that surely is evidence of a delivery of the bill to him.] It is submitted that the requisites of the statute should be strictly observed, and that a constructive delivery is not sufficient.

POLLOCK, C. B.—There ought to be no rule. In the case cited, it does not appear that the bill reached the hands of the attorney's clerk one month before the commencement of the action. Here the bill came into the possession of parties who might have been sued jointly with the defendant. It was, therefore, a sufficient delivery to the defendant.

PARKE, B., ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

(a) 1 Moo. & M. 303.

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Nov. 5.

DOE *d.* STRICKLAND *v.* WOODWARD.

EJECTMENT on a demise dated the 9th of April, 1847, for lands situate in the chapelry of Norton, in the parish of Bredon, in the county of Worcester.

At the trial before *Erle, J.*, at the last assizes for Worcestershire, it appeared that the lessor of the plaintiff was rector, and as rector lord of the manor of the rectory of Bredon, in the county of Worcester. The lands in question were originally held of the manor by copyhold grants for lives, the first on the court roll commencing in 1762, and were from time to time renewed until the year 1834, when they were, with other premises held of the manor, sold under the Land-tax Redemption Act, (42 Geo. 3, c. 116), for the purpose of redeeming a portion of the land-tax charged on the rectory. The last grant of the lands in question was by the Rev. John Keysall, the then rector, at a court baron holden on the 2nd September, 1826, and that grant, which was for three lives, comprised in it in one aggregate holding, and at one aggregate undivided rent, three ancient tenements originally held of the manor under distinct grants, and at distinct rents. There were two other instances on the court rolls (in prior grants) of the union in one grant of copyhold tenements formerly held of the manor by distinct grants. By indenture dated the 29th of August, 1834, between John Keysall, the said rector and lord of the manor of Bredon, the land-tax commissioners, and Mary Anne Thackery, the said J. Keysall did, in consideration, &c., grant, bargain, sell, and convey, and the said commissioners did thereby confirm unto the said M. A. Thackery, the reversion in fee in the premises comprised in the grant of the 2nd of September, 1826, to hold, &c., discharged of all land-tax, &c. The defendant deduced his title under Thackery. The learned judge directed the jury to find for the defendant, and intimated his opinion that the court rolls

The rector and lord of the manor of B. by one grant demised for three lives, at one aggregate holding, and at one undivided rent, three ancient tenements originally held of the manor under distinct grants and at distinct rents. The same rector afterwards disposed of the reversion in fee under the provisions of the Land-tax Redemption Act, 42 Geo. 3, c. 116 :—*Held*, that, though the grant for lives might be void unless sanctioned by a special custom in the manor, yet the purchaser of the reversion had a good title, the sale being approved of by the land-tax commissioners.

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afforded evidence of the existence of a special custom in the manor to unite in one grant tenements originally held under distinct grants and at distinct rents; but, assuming the grant of 1826 to be invalid, his Lordship thought that the defendant had one indefeasible title under the sale in 1834, for the redemption of the land-tax, as that conveyance could cause no injury to the successor, inasmuch as if the grant of 1826 were void, the rector might, before the sale, have made a new valid grant for three lives, and have taken the fine.

Hodgson now moved for a new trial, on the ground of misdirection.—The learned judge was wrong in the view which he took at the trial. The opinion which he expressed, as to there being evidence of a special custom in the manor to unite in one grant tenements originally held under distinct grants, is at variance with the decision of the Court of Queen's Bench in *Doe d. Rayer v. Strickland* (a). The grant of 1826 was void. Lord *Coke*, in his "Compleat Copyholder," sect. 41, says—"In voluntary admittances the lord is an instrument, for though it is in his power to keep the land in his own hands, or to dispose of it at his pleasure, and to that intent he may be reputed as absolute owner; yet, because in disposing of it he is bound to observe the custom precisely to every point, and can neither in estate nor tenure bring in any alteration in this respect, the law accounts him his custom's instrument." [*Parke, B.*—Assuming the grant of 1826 to be invalid, the defendant has a title under the Land-tax Redemption Act.] The bargain and sale under that act would only pass such estate as the rector was able to grant. The 42 Geo. 3, c. 116, s. 69, enabled the rector to sell the "reversion of copyhold lands granted according to the custom of the manor for life or lives;" but, if the grant of 1826 was void, the rector had an

(a) 2 Q. B. 792.

estate in possession, which could not be conveyed in futuro, to take effect as a reversion. [*Alderson*, B.—You say that a greater quantity of estate has been sold than was necessary for the purpose of redeeming the land-tax. The 95th section makes the commissioners judges of the quantity of estate to be sold, and they have determined it. *Rolfe*, B.—Assuming that the grant was void, why should not the commissioners leave it as it was? Is there any reason why they should put the parties to the expense of three grants?] There is no evidence that the commissioners were aware of the fact of the union of the three tenements in one grant. The bargain and sale was an illegal exercise of the powers given by the act. The commissioners supposed that they were disposing of a reversionary interest, whereas it was in truth an estate in possession. A power, whether given by act of Parliament or by will, must be strictly followed. In *Cockrell v. Cholmeley* (a), a testator by his will devised his lands to trustees, with a power of sale. The trustees sold the estate, but as it was supposed that the tenant for life without impeachment of waste was entitled to the produce of the growing timber, the deed for carrying the contract of sale into effect recited, that the trustees had sold the lands for a certain sum, and that the tenant for life had sold the timber then standing thereon for a certain other sum. The purchase-money of the estate was paid to the trustees, and invested according to the directions in the will; the value of the timber was paid to the tenant for life: and it was held that such execution of the power was bad, and not cured by the subsequent investment by the tenant for life, according to the directions in the will, of the money which, under a mistake of the law, had been thus paid over to him. [*Parke*, B.—The distinction between that case and the present is, that there the purchaser had only such title as the vendor could

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(a) 1 C. & F. 60; 10 B. & C. 564.

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give him ; here there has been what may be termed a judicial confirmation of the sale. The lord could not convey without the sanction of the commissioners, and they have given their sanction ; unless, therefore, the judgment of the commissioners can be impeached on the ground of fraud, the sale is valid.] The rector has only received the price of the reversion, whereas he sold an estate in possession. [*Pollock, C. B.*—The case of *Cockerell v. Cholmeley* has no bearing on this case. The rector sold all his interest, and the commissioners approved, as the act requires, of the sale : then why are we to set it aside?] The commissioners acted under the belief that it was only an estate in reversion.

POLLOCK, C. B.—There ought to be no rule. It is a satisfaction to know that if our decision be wrong, the lessor of the plaintiff may bring another action of ejectment, and if the judge at the trial should rule in the same way as in the present case, a bill of exceptions may be tendered, which will bring the question before a superior court. It is unnecessary to go at any length into the grounds upon which our judgment proceeds, because they were fully shewn in the course of the argument. It is said that the grant of 1826 is void, because it united in one grant the three tenements which, it is conceded, might have been granted separately. That objection is of a purely technical nature, and if pointed out to the commissioners might have been rectified. It may be that the commissioners, on being told of the defect, considered that it made no difference whether the rector, who intended to grant, and so understood the deed, conveyed by three grants or one, and therefore they approved of what had been done. Why, then, are we to say that the grant is void ? It does not appear that there was any fraud in the transaction. All that we have to inquire into is, whether the substantial and proper price was paid. It appears that it was ; and we ought not to

interfere, as there was a valid bargain and sale of this property, and the money was paid, and no fraud is imputed.

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PARKE, B.—I am of the same opinion. It is quite clear that my brother *Erle* was right in directing a verdict for the defendant. Whether or no he was right in the opinion he expressed as to the existence of a special custom in the manor to unite in one grant tenements which had been previously conveyed by distinct grants, it is not necessary to determine, because the defendant claims under a bargain and sale, and also under the Land-tax Redemption Act. His title is under that act. It is objected that the prior incumbent did not receive an adequate consideration for the sale of the tenements, because he sold the reversion upon a grant of three lives, and received the price of the reversion only, when it was in fact an estate in possession. The deed is a conveyance of all his interest in the premises under the provisions of the Land-tax Redemption Act, and if no adequate consideration had been paid, the deed would have been simply void as against him. But the objection is to the conveyance of the reversion, and not to the inadequacy of the price. If the defendant had derived his title under copy of court-roll, it might have been void as against a succeeding lord of the manor. But the act of Parliament provides that the decision of the commissioners shall be conclusive as to the adequacy of the price, and it enables the commissioners to dispose of so much of the property as they shall deem sufficient for the purposes of the act. The meaning of that is, that the approbation of the commissioners, together with the conveyance by the tenant for life, shall be a good title, unless impeached by fraud. That being so, the defendant claims under the act of Parliament, and his title must be taken to be valid, unless impeached by fraud, of which there is no pretence here.

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ALDERSON, B.—I am of the same opinion. It is argued that the grant of 1826 is void. It may be so; but if there was a special custom in the manor for the lord to unite separate tenements in one grant, that might be done. How do we know that there was not such a custom, and that the commissioners had not proof of that custom before them? The commissioners may have done perfectly right, as well in law as in justice.

ROLFE, B.—I am of the same opinion, and I merely add a few words in order that it may not be supposed that this decision militates against the case of *Cockerell v. Cholmeley* (a). That case was decided on this principle, that if a conveyance is not in accordance with a power, it is no answer to say, that what was done might have been done in some other form. Apply that principle to the present case. If the question had turned upon whether a sale of the reversion of the land of the three tenements in one grant was good, it would be no answer to say that if the grantee's attention had been called to it at the time, he might have set it right. Such a case would have been analogous to *Cockerell v. Cholmeley*. Here the grant is made valid by reason of the bargain and sale under the act of Parliament. It may be that the grant was void, but that makes no difference; the parliamentary sanction is good, and it is immaterial whether the commissioner giving such sanction knew all the facts or not.

Rule refused.

(a) 1 C. & F. 60; 10 B. & C. 564.

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Nov. 8.

AUGUSTIEN v. CHALLIS and Another.

CASE against the sheriff of Middlesex, for negligence in not levying on the goods of one St. Leger, under a writ of fieri facias issued upon a judgment recovered by the plaintiff, and indorsed to levy 60*l.* 15*s.* 10*d.*

Pleas, not guilty; and that St. Leger had not any goods in the defendants' bailiwick whereof the defendants could have levied the monies indorsed on the writ. Issues thereon.

At the trial before *Platt*, B., at the Middlesex sittings in the present term, it appeared that the sheriff had seized under the writ certain goods in St. Leger's house, but had withdrawn upon receiving notice from the landlord that rent was due. A distress was afterwards put in by the landlord, under which £18 was realised. The landlord, who was called as a witness for the defendant, stated that £46 was due to him for rent; but on cross-examination, it appeared that St. Leger held under a lease which was not produced. It was objected, on behalf of the plaintiff, that the fact of rent being due could not be proved except by producing the lease. The learned judge was of that opinion, but submitted the case to the jury, who found that rent was due, and that the sheriff had notice of it. Under his lordship's direction, a verdict was found for the plaintiff for £18, leave being reserved to the defendant to move to enter a verdict for him.

In an action against a sheriff for negligence in not levying under a writ of *fi. fa.*, the defence was that the sheriff had withdrawn, on notice from the landlord that rent was due. At the trial the landlord stated that rent was due, but on cross-examination it appeared that the execution debtor held under a lease which was not produced:—*Held*, that the fact of rent being due could not be proved without production of the lease, and that the plaintiff was entitled to a verdict.

Humfrey now moved accordingly.—The sheriff was bound to withdraw upon receiving notice that rent was due. [*Parke*, B.—The landlord could not prove that rent was due without producing the lease. *Alderson*, B.—The lease might have been granted at a pepper-corn rent, or at a rent payable ten years hence.] As soon as a sheriff knows that there is a lease under which rent is due, he is

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bound to abstain from selling the goods, or he would be liable to an action at the suit of the landlord. A sheriff cannot be guilty of negligence in omitting to sell goods which the landlord claims. [*Pollock*, C. B. — The sheriff would have a right to ask to see the lease before he withdrew.] He might not know that the defendant held under a lease. [*Pollock*, C. B.—The law casts on him the responsibility of ascertaining how the fact is; for otherwise any person might set up an unfounded claim. There is no particular hardship in this case, more than in that of requiring a sheriff to ascertain whose goods he is seizing.] The fact of rent being due might be proved by parol, notwithstanding the existence of a lease. In *Whitfield v. Brand* (a), it was held that the fact of a party having agreed to sell goods on commission might be proved by oral evidence, though the terms of payment had been reduced into writing. [*Alderson*, B.—So here you may prove by parol the relation of landlord and tenant; but without the lease you cannot tell whether any rent is due.] The jury have found as a fact that rent was due. [*Rolfe*, B.—But there was no evidence to support that finding. *Parke*, B.—The sheriff was guilty of negligence in not selling the goods. He seeks to acquit himself, by saying that the landlord was entitled to distrain; then he ought to prove the right of the landlord to distrain. The moment it appears that there is a lease, you cannot talk about its contents without producing it. There would be plenty of nominal landlords, if we were to hold the sheriff not responsible.]

POLLOCK, C. B.—We are all of opinion that there was no evidence of any real claim for rent, and that the verdict is right.

Rule refused.

(a) 16 M. & W. 282.

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The ATTORNEY-GENERAL v. BAILEY.

Nov. 18.

THIS was an information by the Attorney-General against the defendant, for an infringement of the excise laws. The first and second counts of the information charged the defendant with receiving a large quantity, to wit, twenty gallons, of spirits from a person who was not a licensed distiller. The third and fourth counts were for receiving a large quantity, to wit, twenty gallons, of spirits without a proper permit. The fifth and sixth counts were for receiving a large quantity, to wit, twenty gallons, of spirits after they had been removed from the place where they ought to have been charged with duty, and before the duty had been charged. The last count was for removing and concealing goods, to wit, twenty gallons of spirits, on which a duty was imposed, with intent to defraud her Majesty.—The defendant pleaded not guilty.

The case came on for trial before the Lord Chief Baron at the sittings after Trinity Term, 1846, when a verdict for the Crown was taken by consent, subject to the opinion of the Court upon the following case:—

The defendant is a wholesale druggist and manufacturing chemist, residing at Wolverhampton. In the month of December, 1842, one William Faulconbridge called upon the defendant and offered him for sale, without any permit, some spirits of wine fifty-six per cent. over proof, which had been illegally and privately distilled, and which had not paid or been charged with any duty. The defendant was aware at the time that the spirits so offered to him had been illicitly distilled, and had not paid, or been charged with, duty. He refused to buy any such spirits, but informed the said Faulconbridge that if he would make the spirits into spirits of nitre, he, the defendant, would buy £30 worth a week of him. The said William Faulconbridge said he did not know how to make spirits of nitre, and the defendant then

Sweet spirits of nitre are not "spirits" within the meaning of the excise acts, 6 Geo. 4, c. 80, ss. 107, 133; 7 & 8 Geo. 4, c. 53, s. 32; 2 Will. 4, c. 16, s. 10. Therefore a person who buys from one who is not a licensed distiller, and without a permit, sweet spirits of nitre, the duty on which has not been paid, is not liable to the penalties imposed by those statutes.

The term "spirits" in those acts signifies an inflammable liquid produced by distillation, either pure, or mixed only with ingredients which do not convert it into some article of commerce not known in common parlance under the general appellation of "spirits."

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explained to him how to do so, and furnished him with certain ingredients, viz. oil of vitriol and ground saltpetre, and sold him a still for that purpose.

Within a short time afterwards, the said William Faulconbridge mixed the materials with which the defendant had provided him with a quantity of illicitly and privately distilled spirits, which had not paid duty, and distilled from them sweet spirits of nitre, and delivered the spirits of nitre so made, consisting of two gallons, to the defendant, who accepted and paid for it.

From that time down to the time of exhibiting the information, the defendant was in the habit of receiving and paying for, on numerous occasions, without a permit, from the said William Faulconbridge, in quantities of several gallons at a time, sweet spirits of nitre, which were made from spirits of wine and nitric acid (the nitric acid being substituted for the oil of vitriol, and saltpetre used on the first occasion).

To make four and a half gallons of sweet spirits of nitre, six gallons of spirits at fifty-six per cent. over proof were used.

Sweet spirits of nitre is an article usually sold by chemists and druggists, and the spirits of nitre so purchased and received by the defendant from the said William Faulconbridge on the occasions aforesaid were merchantable sweet spirits of nitre.

The ordinary article of trade called sweet spirits of nitre is made from spirits of wine, on which a duty is paid of 11s. 9d. per gallon, and the ordinary cost price of sweet spirits of nitre so made is from 18s. to 25s. per gallon. The price paid by the defendant to Faulconbridge was 12s. 9d. per gallon.

The chemical analysis of sweet spirits of nitre is as follows:—Eighty per cent. uncombined spirits, and the rest hyponitrous ether. Hyponitrous ether is a chemical compound of hyponitrous acid and alcohol. According to

some methods of making sweet spirits of nitre, hyponitrous ether is not separately produced; while, according to other methods, they are made by a direct mechanical admixture of hyponitrous ether with spirits, in the proportion of four pints of the latter to one of the former.

The spirits from which the sweet spirits of nitre above mentioned were on all occasions made, had been privately and illegally distilled by Faulconbridge, who was not at any time a licensed dealer in or retailer of spirits, and no duty was ever paid or charged on any part of such spirits.

The defendant, William Bailey, was throughout and during the whole time of the above dealings and transactions with Faulconbridge, fully aware that the spirits of which the sweet spirits of nitre above mentioned were on every occasion composed had been illegally distilled by the said William Faulconbridge, and had not paid or been charged with the duty, and that the said William Faulconbridge was not a person duly qualified and licensed by law to sell or distil spirits. The defendant also supplied Faulconbridge on the above occasions with the ingredients, viz. in the first place with oil of vitriol and ground saltpetre, and afterwards with nitric acid for mixing with the spirit from which the spirits of nitre were distilled, for which ingredients no charge was made by the defendant upon the said William Faulconbridge.

The pleadings are to form part of the case.

If the Court should be of opinion that on the above facts the defendant has rendered himself liable to any of the penalties sought to be recovered, under any of the counts of the information, a verdict for the Crown is to be entered for one penalty on any such count. If the Court should be of a contrary opinion, a verdict is to be entered for the defendant.

The *Attorney-General*, in last Easter Term (April 30), argued on behalf of the Crown.—The first and second,

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and fifth and sixth counts, are framed on the 6 Geo. 4, c. 80, ss. 107, 133 (a). The third and fourth counts are

(a) Sect. 107 : " And for the more effectually preventing the receiving or buying by any person whomsoever, of spirits from persons privately distilling or unlawfully importing or landing the same, be it further enacted, that if any rectifier or compounder of, or any dealer in or retailer of spirits, or any other person whomsoever in any part of England shall receive or buy, or shall procure or employ any person to receive or buy, any spirits from any person or persons whomsoever, except from some licensed distiller, rectifier, or compounder of spirits, whose name shall be painted over the outward door of his still-house, store-house, warehouse, shop, cellar, vault, or other place, in manner required and directed by this act, or from some licensed dealer in or retailer of spirits, or at some public sale of spirits condemned, and sold under the direction of the commissioners of excise or customs, every such person so offending, shall, for every such offence, forfeit and lose the sum of £500 : Provided always, nevertheless, that nothing herein contained shall extend or be construed to extend to make any person or persons liable to the aforesaid penalty of £500 for or by reason of the receipt or purchase of any foreign or colonial spirits or British spirits brought into England from Scotland or Ireland, under the provisions of this act,

whilst the same shall be lying openly on the lawful quays on which such spirits respectively shall have been first landed upon the importation thereof, or removal thereof from Scotland or Ireland, or in any warehouse or warehouses in which such foreign or colonial spirits shall be or may have been deposited by such seller according to law ; every such seller of British spirits imported into England from Scotland and Ireland respectively, being at that time duly licensed under this act as a dealer in spirits."

Sect. 133 enacts, " That if any person or persons shall knowingly receive, buy, or have in his, her, or their custody or possession any spirits, after the same shall be removed from the place where the same ought to have been charged with the duty payable in respect thereof, or before the duty to which the same shall be liable has been charged and paid or secured to be paid, or before such spirits have been lawfully condemned as forfeited, the person or persons offending therein, whether he, she, or they had or have, or had or have not, or do or do not claim or pretend to have any property or interest therein, shall for every such offence forfeit and lose all such spirits so received, bought, or had in his, her, or their custody or possession, and treble the value thereof according to and at the rate and price which the best

founded on the 2 Will. 4, c. 16, s. 10 (a); and the last count on the 7 & 8 Geo. 4, c. 53, s. 32 (b). The same question arises on all, namely, whether sweet spirits of

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spirits of the like kind and strength do or shall bear and sell for in London at the time when such penalty shall be incurred."

(a) Enacts, "That every person who shall remove, deliver, or send out, or cause or suffer to be removed, delivered, or sent out from his stock, custody, or possession any commodities for the removal whereof a permit is or shall be required, without a proper permit accompanying the same, or who having obtained a permit shall not send out therewith the commodities therein described, or return and re-deliver the said permit to the proper officer of excise within the time hereinbefore required, and every person who shall take or receive, or suffer to be taken or received into, or shall have in his, her, or their stock, custody, or possession any commodities for the removal whereof a permit is required, without a proper permit accompanying, or having accompanied the same, shall forfeit for every such offence £200."

(b) Enacts, "That in case any goods or commodities for or in respect whereof any duty of excise is or shall be imposed on any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities, shall be removed, or shall be deposited or concealed in any place, with any intent to defraud his Majesty of

such duty or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels respectively shall be forfeited; and in every such case, and in every case where any goods or commodities shall be forfeited under this act, or any other act or acts of Parliament relating to the revenue of excise, all and singular the casks, vessels, cases, and other packages whatsoever containing or which shall have contained such goods or commodities respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other cattle, and all things used in the removal, or for the deposit or concealment thereof respectively shall be forfeited, and every person who shall remove, deposit, or conceal, or be concerned in removing, depositing, or concealing any goods or commodities, for or in respect whereof any duty of excise is or shall be imposed, with intent to defraud his Majesty of such duty or any part thereof, shall forfeit and lose treble the value of such goods and commodities, or the sum of £100, at the election of the commissioners of excise or customs, or of the commissioner or commissioners and assistant commissioners of excise or customs in Scotland and Ireland respectively, or the person who shall inform or sue for the same."

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nitre are "spirits" within the meaning of those acts. The 133rd sect. of the 6th Geo. 4, c. 80, must be read together with the 132nd sect., which enacts, "that if any person shall *knowingly* sell or deliver, or cause to be sold or delivered, directly or indirectly, any quantity of spirits to any other person, to the end that the same may be unlawfully retailed or consumed, or carried into consumption, in any part of England, such person so offending shall forfeit and lose over and above all other penalties the sum of one hundred pounds." Then the 133rd sect. subjects to a penalty "any person or persons who shall *knowingly* receive, buy, or have in his, her, or their custody or possession, any spirits" for which duties have not been paid. Some meaning must be attached to the word "*knowingly*." In many cases of prohibited articles, knowledge is immaterial, and the word "*knowingly*" must have been introduced into those sections for the purpose of prohibiting the sale or receipt, *in any shape*, of spirits, for which duty has not been paid. Here there was a manifest intention to conceal the spirits, by forming a compound, for the purpose of evading the duty, which brings the case within the 32nd sect. of the 7 & 8 Geo. 4, c. 53. The 101st sect. of the 6 Geo. 4, c. 80, in order "to remove all doubts respecting the denomination of spirits, and of spirits of different distillations," enacts, "that all spirits distilled or made in England, or distilled or made in Scotland or Ireland, and imported into England, shall be deemed and called British spirits; and that all spirits of the first extraction, drawn or produced by one distillation of wash shall be deemed and called low wines; and that all spirits produced by the redistillation of low wines, or by further redistillation, and which shall be conveyed into and kept in any feints receiver, shall be deemed and called feints; and that all other spirits produced by redistillation, and which shall not have had any flavour communicated thereto, and all liquors whatsoever, which shall be mixed or mingled with any such spirits, shall be deemed

and called plain British spirits, and that all other spirits produced by re-distillation, and which shall have had any flavour communicated thereto, and all liquors whatsoever which shall be mixed or mingled with any such spirits, shall be deemed a British compound called British brandy; and that all other spirits produced by re-distillation, and which shall have been distilled or mixed with juniper berries, caraway seeds, aniseeds, or any other seeds, preparation, or *ingredient whatsoever, used in the compounding of spirits*, and all liquors whatsoever which shall be mixed or mingled with any such spirits, shall be deemed and called British compounds; and that all British spirits of the strength of forty-three per centum above proof, as denoted by the hydrometer called Sikes' hydrometer, and all spirits of a greater or higher degree of strength, shall be deemed and called spirits of wine," &c. There is no question that this sweet spirit of nitre was made of "spirits." The case finds that every four and a half gallons of sweet spirits of nitre contained six gallons of spirits at fifty-six over proof; and further, that the chemical analysis of the compound gives eighty parts of uncombined spirits, to twenty of hyponitrous ether. It therefore retains all its character of "spirits," and is a "liquor mixed and mingled with spirits," within the meaning of the 101st sect. of the 6 Geo. 4, c. 80. That view is supported by the 92nd sect. of the same act, which enacts, "that no spirits, whether *medicated or mixed with any other ingredient or ingredients, or not*, which shall be made or distilled in England, Scotland, or Ireland, respectively, shall be removed or sent from either Scotland or Ireland into England, or from England into Scotland or Ireland, except such spirits only as shall, for the purpose of such removal, be taken from and out of a warehouse, in which the same shall be then warehoused, without payment of duty," &c. *The Attorney-General v. Green (a)* decided, that a maker of

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(a) 4 Price, 224.

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vinegar for sale, whether as vinegar or as blacking, or as any other article not being vinegar properly so called, or pure and applicable to the common uses of vinegar, is liable to the duty of excise, and the other provisions of the several statutes relating to the makers and preparers of vinegar for sale. The same point was determined in the case of *The Attorney-General v. Houlgrave (a)*. The 5 Vict. sess. 2, c. 25, which repealed the 6 & 7 Will. 4, c. 72, supports the construction contended for.

Martin, contra (*Montague Smith* with him).—First, if the words “sweet spirits of nitre” were substituted for the word “spirits”, in this information, the defendant would not appear liable to any penalty, and the information would be bad in arrest of judgment. *The Attorney-General v. Green* only decided, that where a person, in his trade of blacking-maker, made a distinct article mentioned in the act of Parliament, viz. vinegar, that article was liable to duty. Here the defendant has bought sweet spirits of nitre, not the component parts of it. Faulconbridge was in no sense the agent of the defendant. [*Parke*, B.—If Faulconbridge had spoiled the mixture, could the defendant have maintained any action against him?] Clearly not. “Sweet spirits of nitre” is an article usually sold by chemists, and is among those enumerated in the schedule of the 5 Vict. sess. 2, c. 25. The Court are bound to take judicial notice of the meaning of the words “sweet spirits of nitre:” 1 Roll. Abr. 86, 525. Its chemical analysis, found in “The London Pharmacopœia,” shews that an amalgamation of several things forms that one article, which, when made, ceases to be “spirits.” It does not appear by the case that the hyponitrous ether can be separated from the “spirits,” except by distillation. The 6 Geo. 4, c. 80, has no reference to “sweet spirits of nitre,” but applies only to ordinary “spirits” con-

(a) 11 Price, 217.

sumed as a beverage. The 101st section, which has for its object the removal of all doubt as to the meaning of the word "spirits," gives five different definitions, but "sweet spirits of nitre" is not found among them. The 133rd section, in using the word "spirits," means spirits to which the act applies, not spirits combined with any other article. No permit is necessary for the removal of this spirit from Scotland or Ireland. By the 101st section of the 6 Geo. 4 c. 80, spirits distilled in Scotland or Ireland are deemed British spirits, and, as such, are subject to duty. But it was not so with sweet spirits of nitre until the passing of the 6 & 7 Will. 4, c. 72, s. 3, which first required a permit upon the removal of that spirit from Scotland or Ireland to England. The 6 & 7 Will. 4, c. 72, has, indeed, been repealed by the 5 Vict. sess. 2, c. 15; but the fact of an act of Parliament being required to subject "sweet spirits of nitre" to the control of the excise, is conclusive to shew that the legislature did not consider it as "spirits" mentioned in the 6 Geo. 4, c. 80.

Secondly, the subject-matter of the offence relates to a British compound, called "sweet spirits of nitre," and it ought to have been so described in the information. It is an established rule in criminal pleading, that, when the subject-matter is defined by a statute, the descriptive words contained in the act must also be used in the indictment or information (*a*). [*Parke, B.*—The 7 Geo. 4, c. 64, s. 21, does not apply to an information of this kind, but only to indictments or informations for felony or misdemeanor.] The charge is, that the defendant has received "spirits;" but the proof was that he received "sweet spirits of nitre."

The *Attorney-General*, in reply.—The words in the

(*a*) 2 Russell on Crimes, 109; 1 Stark. Crim. Plead. 192.

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132nd section of the 6 Geo. 4, c. 80, "to the end that the same may be unlawfully retailed or consumed, *or carried into consumption*," are sufficient to embrace every mode in which spirits can be used; and if a party knowingly receives them when combined, he becomes subject to the penalty in the 133rd section. The 24 Geo. 2, c. 40, s. 12, which prohibits any action for the recovery of a debt due for spirituous liquors sold in less quantities than twenty shillings, has been held to apply to spirits mixed with water: *Scott v. Gillmore* (a); 1 Selw. N.P. 54(b). The allowance of drawbacks on "sweet spirits of nitre," by the 5 Vict. sess. 2, c. 25, shews that the legislature considered that the duty was paid on the "spirits." The true construction of these acts is, that all spirits, whether pure, mixed, or medicated, shall be liable to duty.

Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B.—This was an information against the defendant for an infringement of the excise-laws, in having purchased and received from a person named Faulconbridge, who was not a licensed distiller or rectifier, a large quantity of spirits without a permit, and the duty on which had not been paid. There were several counts in the information, the subject-matter of the illicit dealing being in all of them described as *a large quantity, to wit, twenty gallons of "spirits."*

It was proved at the trial, that the defendant, who is a wholesale druggist and manufacturing chemist, had for some time been in the habit of purchasing from Faulconbridge large quantities of sweet spirits of nitre. It was also proved that the sweet spirits of nitre so sold were made by

(a) 3 Taunt. 226.

(b) 10th edit.

mixing nitric acid with spirits of wine, except on the first occasion, when oil of vitriol and saltpetre were used instead of nitric acid.

The spirits used by Faulconbridge in making the sweet spirits of nitre had all been illegally distilled by him, and no duty had been paid; all which was known to the defendant, who supplied Faulconbridge gratuitously with the nitric acid, which he mixed with the spirits of wine.

The sweet spirits of nitre so supplied to the defendant were ordinary merchantable sweet spirits of nitre, such as were usually sold by chemists and druggists.

The defendant was convicted on all the counts of the information; and there is no doubt but that the conviction is perfectly good, if the sweet spirits of nitre supplied by Faulconbridge were "*spirits*" within the true intent and meaning of the 6 Geo. 4, c. 80, and two subsequent acts on which the information was founded.

The Attorney-General, in support of the conviction, argued that the liquid seized was clearly "*spirits*" within the statutes; it having been proved at the trial that every four and a half gallons of the sweet spirits of nitre in question contained six gallons of spirits, at fifty-six over proof; and further, that the chemical analysis of the compound gives eighty parts of uncombined spirits to twenty of hyponitrous ether; and he further argued, that, by the very terms of the stat. 6 Geo. 4, c. 80, s. 101, such a mixture is defined to be the spirits within the act. The language of the clause referred to is as follows:—After previous enactments as to what shall be deemed to be "low wines," and what to be "feints," it goes on to enact, "that all other '*spirits*' produced by re-distillation, and which shall not have had any flavour communicated thereto, and all liquors whatever which shall be mixed or mingled with any such '*spirits*,' shall be deemed and called '*Plain British Spirits*;' and that all other '*spirits*' produced by re-distillation, and which shall have had any flavour communicated thereto, and

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all liquors whatever which shall be mixed or mingled with any such '*spirits*,' shall be deemed a British compound, called 'British Brandy.'

With respect to any argument to be deduced from this last-mentioned section, it must be observed, that there is not, in truth, any definition as to what is meant by the word "*spirits*." The section is not an interpretation clause, explaining the meaning of the word "*spirits*," but an enactment as to what are to be deemed to constitute the different classes or denominations of "*spirits*." It assumes that "*spirits*" is a word of known import, and then proceeds to define the different classes of spirits; so that it does not enable us to determine the material point in this case, namely, what is the meaning of the word "*spirits*." In the absence, therefore, of any statutable definition, we must assume that the word is used in the Excise acts in the sense in which it is ordinarily understood; and we do not think that, in common parlance, the word "*spirits*" would be considered as comprehending a liquid like "*sweet spirits of nitre*," which is itself a known article of commerce, not ordinarily passing under the name of "*spirits*." It is very true the case finds that "*spirits*" enter very largely into the composition of sweet spirits of nitre, but so they do into the article called sal volatile, and into most, if not into all, kinds of varnish, and so as to other fluids, which certainly no one, in common parlance, would speak of as "*spirits*." And we think that nothing can be taken to be "*spirits*" within the meaning of the 6 Geo. 4, c. 80, which does not come under the definition of an inflammable liquid produced by distillation, either pure or mixed only with ingredients which do not convert it into some article of commerce not known, in common parlance, under the genuine appellation of spirits. It will be observed, that, in the 101st section, referred to by the Attorney-General, all the liquids there enumerated come within the description of liquids in different stages of progress towards alcohol, either pure or

mixed with some other fluid or matter *supposed to render it more agreeable as a beverage.*

The argument derived from the 6 & 7 Will. 4, c. 72, and the 5 Vict. c. 25, is entitled to great weight, and is strongly confirmatory of our view of this case. The object of those statutes was to put England, Scotland, and Ireland on an equal footing in the exportation from one country to the other of articles which have paid a duty of excise, the amount of which varies in the different countries. For this purpose the statutes allow a drawback in the case of exportation from the country where the duty is high, and impose a corresponding export duty on exportation from the country where the duty is low. These statutes are only material to the present case so far as they shew that the legislature did not treat the subject-matter of the enactments in those statutes (and which in terms comprise sweet spirits of nitre) as being "*spirits*," but as being *mixtures, compounds, or preparations, into the manufacture of which spirits enter as the basis or principal ingredient or material thereof.* This certainly tends very forcibly to shew that we are right in holding that sweet spirits of nitre are not, in the opinion of the legislature, of themselves to be considered as "*spirits.*"

Another strong argument in favour of our view of this case is derived from the licensing acts. The 6 Geo. 4, c. 81, compels every retailer of "*spirits*" to take out a license, for which he is to pay a duty at certain specified rates; and he cannot get such a license without also taking out a license to sell beer, which he can only do after obtaining a previous license from a magistrate. If, therefore, sweet spirits of nitre be "*spirits*" within the true intent and meaning of the Excise acts, it can only be sold by a licensed dealer in beer and spirits, and the same observation will apply to sal volatile, spirit varnish, and many other articles of commerce of which spirits are a principal component part. All these matters are notoriously sold, and

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indeed this case states that they are sold, not by licensed dealers in *spirits*, but by chemists, apothecaries, and others; and we consider this to be a strong confirmation of the view of the case which treats them as something distinct from spirits, however largely spirits may enter into their composition.

The only reported case relied on by the Attorney-General was *The Attorney-General v. Green (a)*, but that case differs materially from the present. It was an information in rem for the condemnation of a large quantity of *liquor preparing for vinegar*, fraudulently deposited in an unentered place. The information was framed on the 43 Geo. 3, c. 69, which imposes a duty on every barrel of vinegar, or *liquor preparing for vinegar*, which shall be made for sale. The defendant was a blacking manufacturer, and the liquor was clearly a *preparation for vinegar*, mixed with lamp-black and other ingredients used in making blacking, and it was proved that the liquid, though used merely for the manufacture of blacking, was really good vinegar when it had been left to stand and deposit the lamp-black and other materials used with it. The real question in that case was, whether, in order to bring the liquor in question within the provisions of the statute, it was necessary to allege and prove that it was liquor preparing *for vinegar for sale as vinegar*. The Court held that it was not, and that it was liable to seizure if it was liquor preparing for sale, whether it was to be sold *as vinegar* or *otherwise*. It is obvious that this is not at all the present case. The analogous case would have been, if proceedings had been taken against a purchaser of the blacking thus made, alleging that he had unlawfully in his possession *vinegar* which had not paid duty. The case is certainly no authority for holding that such a proceeding could have been supported. Inasmuch, therefore, as sweet spirits of nitre is itself a well-known article of commerce,

(a) 4 Price, 225.

not commonly known under the name of "*spirits*," and not adapted for ordinary use as an intoxicating beverage, we think it is not "*spirits*" within the meaning of that word as used in the information, and, consequently, there must be judgment for the defendant.

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Judgment for the defendant.

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INDEBITATUS assumpsit for work and labour as a hired servant, and on an account stated.

Plea, non assumpsit.

At the trial, before the under-sheriff of Bristol, in August last, it appeared that the plaintiff had been in the defendant's service as cook, but that from some suspicions which he entertained about her, he had dismissed her without any previous warning, but that he had paid her her wages up to the time of her dismissal. This action was brought to recover a month's wages, commencing from the day of her discharge from the defendant's service. The under-sheriff nonsuited the plaintiff, on the ground that the declaration should have been special, and that the plaintiff could not recover under the common count for work and labour.

A menial servant, entitled under the hiring to a month's wages, cannot recover a month's wages for having been improperly dismissed without a month's warning, upon the common indebitatus count for work and labour.

Montague Smith having obtained a rule to set aside the nonsuit,

Greenwood shewed cause.—The ruling of the under-sheriff was correct, as the plaintiff is not entitled to recover her claim under the common count. No services were actually performed by the plaintiff during the month. There are cases which conflict with each other upon this point. In

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Archard v. Hornor (a), which was similar to the present case, Lord *Tenterden* held that a servant could not recover on the common count wages for any further period than that for which he had actually served. *Gandell v. Pontigny* (b) is a case the other way, but that is distinguishable from the present. There the plaintiff had been improperly dismissed in the middle of the quarter, having been hired by the quarter, and Lord *Ellenborough* held, that the plaintiff was entitled to recover under this form of declaration for the whole quarter; but the plaintiff in that case had served part of the quarter, and had made an offer the day after his discharge to go on with the duties of his situation. Lord *Ellenborough* there says, "If the plaintiff was discharged without a sufficient cause, I think the action is maintainable. Having served a part of the quarter, and being willing to serve the residue, in contemplation of law he may be considered to have served the whole." Here the plaintiff served no part of the month, nor did she make any offer to do so.

These two cases were brought before the notice of the Court of Queen's Bench, in the later case of *Smith v. Hayward* (c), where Lord *Denman* says, "I think this rule was granted for the purpose of bringing the case of *Gandell v. Pontigny* into question, and that there would have been no rule but for that case. The view taken by Lord *Ellenborough* of the point there decided, was different from that which Lord *Tenterden* took of the same point in *Archard v. Hornor*, and if we were bound to decide between the two authorities, I should say that the latter case is grounded on the better reason. There is obviously a great difference between suing for a breach of contract in dismissing the plaintiff, and for work and labour which, by reason of the dismissal, has not been performed. The defence in the

(a) 3 C. & P. 349. (b) 4 Camp. 375. (c) 7 Ad. & Ell. 544.

last case would be the non-performance of the work ; in the other, some excuse for breaking off the contract." In a note to *Snelling v. Lord Huntingfield* (a), it is stated that it would seem from that that *Gandell v. Pontigny* could not be supported. [*Parke, B.*, referred to *Eardley v. Price* (b).] That case was disposed of without any authorities being referred to. *Collins v. Price* (c) is similar to it. In *Hartley v. Harman* (d) the plaintiff declared specially for damages in respect of his dismissal without notice, and endeavoured under that count to recover prior wages as part of the damages. *Denman, C. J.*, there said, "The plaintiff might have declared in a special count for the month's wages, and in a common count for the rest." The rule as regards domestic servants is, that though hired for a year, they may be dismissed on a month's notice or payment of a month's wages ; *Beeston v. Collyer* (e) ; but the declaration should be special, for the month's wages are not paid for services done, but for the dismissal without warning. The nonsuit was therefore correct.

M. Smith, contra.—It is submitted that the plaintiff is entitled to succeed in this form of count. The contract is, that a certain sum shall be paid for the plaintiff's services, and a certain sum in addition to that, should she be dismissed without a month's warning. [*Parke, B.*—The month's wages are to be paid, not for the bygone services, but for the improper dismissal of the servant. That argument can only be rested on the case of *Eardley v. Price*, and the correct view seems to be that adopted by the Court of Queen's Bench in *Smith v. Hayward*.] In *Eardley v. Price*, *Mansfield, C. J.*, said, "The moment that the scholar was taken away without notice, the master was entitled to be paid the additional quarter, which shews that the addi-

(a) 1 C., M., & R. 26.

(b) 2 N. R. 333.

(c) 5 Bing. 132.

(d) 11 Ad. & Ell. 798.

(e) 4 Bing. 309.

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tional price was for the things previously furnished ;" and *Chambre, J.*, also said, " The contract in this case being no longer executory at the time when the demand arose, the objection founded on the stipulation being a matter of special contract does not apply." Here nothing remained to be done by the plaintiff; her right to the month's wages arose upon her improper dismissal. *Smith v. Kingsford (a)* is a decision in the plaintiff's favour. [*Parke, B.*—That case was decided on the ground that there was no dissolution of the contract of hiring.]

POLLOCK, C. B.—I am of opinion that this rule should be discharged. This was a special contract between the parties, and I think that the under-sheriff ruled correctly that the present claim for a month's wages could not be recovered on the common count for work and labour. The argument of *Mr. Smith*, founded upon the case of *Eardley v. Price*, is, that this month's wages should be considered as a compensation for bygone services. If that argument were held to be good, the result would be, that when parties make a bargain, whatever the terms of it may be, the Court would be at liberty to substitute any other contract, provided the same conclusion should be arrived at, and that this should be done for the purpose of obtaining what might appear to the Court to be justice between the parties. Such a rule would be dangerous, and it is difficult to say where we should stop. It amounts to this, that provided you can shew that another set of terms come to the same practical conclusion, the Court is at liberty to substitute them for the real contract between the parties. In the present case, the servant claims a month's wages for being turned away without a month's warning. As far as regards the amount of the mere claim, it is the same as if the master were to pay her the additional sum for bygone services for dis-

(a) 3 Scott, 279.

charging her without a month's warning. But this is not, I think, the contract. I regret that the party is unable to recover her claim in this form of count; it is not the proper form, but it should have been a special one. The case of *Archard v. Hornor* governs the present; it has been recognised by all the Courts, and has been acted upon in this Court, in the case of *Bryxham v. Wagstaffe* (a).

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PARKE, B.—I agree with the opinion expressed by the Lord Chief Baron. The good sense of the matter is to be found in *Archard v. Hornor*, which was afterwards confirmed by the Court of Queen's Bench in the case of *Smith v. Hayward*, and also by this Court. It is not broken in upon by the case of *Smith v. Kingsford*, which proceeded on a different ground. The contract in the present case is, that the service is for the year, but the master is at liberty to dismiss the servant by giving her a month's wages or warning. It is a refinement to say that these wages are a compensation for bygone services. *Eardley v. Price* broke in upon the rules of law, perhaps, in order to do what appeared to be justice in that particular case. *Archard v. Hornor*, in my opinion, governs the present case.

ALDERSON, B.—I am of the same opinion. When we say that the servant is to have a month's warning or a month's wages, it is meant that the payment to be made for the dismissal without warning is to be by way of compensation, and that the amount is to be equal to a month's wages.

ROLFE, B., concurred.

Rule discharged.

(a) 5 Jurist, 845.

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The plaintiff had advanced to the defendant several sums, amounting to £5000, less the sum of £250, which C., the agent of both parties, improperly retained without the authority or knowledge of the plaintiff; and C. received five bills of exchange accepted by the defendant, to the amount of £5000, by way of security; the dates of the bills did not exactly correspond with the dates of the advances, nor were the advances in the exact sums for which the bills were given. The plaintiff accepted an annuity from the defendant, in satisfaction of the bills and the £5000 secured thereby. The memorial, under the title "consideration, and how paid," was to this effect—£5000 made up of five several sums of £300, £200, £2000, £1500, and £1000, previously lent and advanced by the plaintiff to or for the use of the defendant and E. J. L. and owing to the plaintiff on security of five several bills of exchange drawn by E. J. L., upon and accepted by the defendant, and indorsed by E. J. L., the said consideration being paid or satisfied by the cancellation of the same bills; and a release by the plaintiff of the defendant and E. J. L. from the sum secured thereby, and interest:—*Held*, that the memorial, as required by the 55 Geo. 3, c. 141, was sufficient; for that it is not necessary, in the case of existing bygone debts, to state when and how each sum constituting the debt was advanced.

COVENANT.—The declaration was upon an annuity-deed, dated the 21st of December, 1842, made between the defendant of the first part, E. J. Lack (the son of the defendant) of the second, H. M. Elderton of the third, the plaintiff of the fourth, and C. R. Hall and R. Phillott of the fifth part. The declaration set out the whole of the deed, which, after reciting that the plaintiff had at various times advanced and lent to the defendant and his son, amongst other monies, the several sums of £300, £200, £2000, £1500, and £1000, as a security for the payment whereof C. R. Hall then held several bills of exchange, drawn by E. J. Lack upon and accepted by the defendant, and indorsed by E. J. Lack and H. M. Elderton; namely, 1st, a bill of exchange dated 22nd day of July, 1841, for the sum of £300, payable three months after date; 2ndly, a bill of exchange dated the said 22nd day of July, 1841, for the sum of £200, payable three months after date; 3rdly, a bill of exchange dated the 29th day of July, 1841, for the sum of £2000, payable three months after date; 4thly, a bill of exchange dated the 3rd day of August, 1841, for the sum of £1500, payable two months after date; and 5thly, a bill of exchange dated the 18th day of August, 1841, for the sum of £1000, payable two months after date: and further reciting, that the said sums of £300, £200, £2000, £1500, and £1000, were then still due and owing to the plaintiff, but

all interest which had accrued for the same had been paid up: and further reciting, that the defendant and E. J. Lack had some time previously contracted with the plaintiff for the sale to him, for and in consideration of the said several sums of £300, £200, £2000, £1500, and £1000, owing as aforesaid upon the security of the said bills of exchange, such consideration to be paid and satisfied by a release to be given by him to the defendant E. J. Lack, and also to H. M. Elderton, from the same sums, by the cancellation or destruction of the said bills of exchange, of an annuity or clear yearly sum of 804*l.* 14*s.*, to be paid during the life of the defendant, to be secured by a grant thereof by the defendant and E. J. Lack, and by their joint and several covenant for the payment of the same: and further reciting, that in performance on his part of the said contract or agreement, the plaintiff had that day delivered up the thereinbefore mentioned recited bills of exchange to the defendant and E. J. Lack, by whom the same had been cancelled or otherwise destroyed; it was witnessed by the said indenture, that in further performance on the part of the plaintiff of the said before recited contract or agreement, he, the plaintiff, had acquitted, released, and discharged the defendant and E. J. Lack, and did thereby acquit, release, and discharge them, and also H. M. Elderton, of and from the said several sums of £300, £200, £2000, £1500, and £1000, arising as aforesaid upon the security of the thereinbefore recited bills of exchange, and all interest and arrears of interest (if any) thereof respectively, and of all claims in respect thereof; and it was also further witnessed by the said indenture, that on performance, on the part of the defendant and E. J. Lack, of the said recited contract or agreement, and for and in consideration of the said several sums of £300, £200, £2000, £1500, and £1000, so as aforesaid theretofore advanced and lent to them by the plaintiff, and at or immediately before the execution of the said

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indenture due and owing to him upon the security of the thereinbefore recited bills of exchange, but released or otherwise discharged by him by the said indenture, and by the cancellation or other destruction of the said bills of exchange thereinbefore expressed and mentioned, and which said several sums the defendant and E. J. Lack did thereby admit to be in full for the purchase of the annuity or yearly sum thereinbefore granted and secured, they, the defendant and E. J. Lack, did thereby grant to the plaintiff an annuity or clear yearly sum of 804*l.* 14*s.*, payable quarterly, upon certain days mentioned in the indenture. The deed contained a great many other provisoes, which are not material to the question in the case, and after alleging performance on the part of the plaintiff of all the stipulations to be performed by him, concluded with several breaches, one of which was for the non-payment by the defendant of the annuity, to the plaintiff's damage of £4000.

The defendant, amongst other pleas, pleaded, 2ndly, that the said indenture was made after the passing of the Annuity Act, 53 Geo. 3, c. 146, that the annuity was granted for a pecuniary consideration, and that no memorial of the said annuity was inrolled in the High Court of Chancery, according to the provisions of the said act of Parliament, whereby the said indenture was null and void.—Verification.

The plaintiff replied, that a memorial of the said annuity was duly inrolled, which, so far as it is material to the present case, was as follows:—

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<i>Date of Instrument.</i>	<i>Nature of Instrument.</i>	<i>Names of Parties.</i>	<i>Names of Witnesses.</i>	<i>Names of Persons by whom Affidavit or Release is to be respectively received.</i>	<i>Person for whose Life the Annuity or Rent-charge is granted.</i>	<i>Consideration, and how paid.</i>	<i>Amount of Annuity or Rent-charge.</i>
21st December, 1842.	Indenture of release of certain debts or sums of money, of grant of annuity, and of assignment of a certain pension or yearly allowance, and substitution or commutation of same.	John Lack of the first part, Edward John Lack of the second part, Henry Merriek of the third part, Charles Ranken Hall of the fourth part, Charles Ranken Hall and Robert Phillott of the fifth part.	James Davey, clerk to Messrs. Elderton and Phillott, solicitors, 25, Clement's-lane, London; Edward Houl-ditch, Rector of Staplegrove.	Charles Ranken Hall.	John Lack	£5000 sterling (made up of five several sums of £300, £200, £2000, £1500, and £1000 sterling respectively), previously lent or advanced by Charles Ranken Hall to or for the use of John Lack and Edward John Lack, and owing to Charles Ranken Hall, upon the security of five several bills of exchange, of payment drawn by Edward John Lack upon, and accepted by, John Lack, and indorsed by Edward John Lack and Henry Merriek Elderton, the said consideration being paid or satisfied by the cancellation or destruction of the same bills, and a release by Charles Ranken Hall of John Lack, Edward John Lack, and Henry Merriek Elderton, from the sums respectively secured thereby, and interest.	£804 14s. per annum, and a proportional part thereof from the last preceding quarterly day of payment thereof, up to the day of the determination of the same.

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The replication then concluded by alleging, amongst other matters, that the memorial did truly contain, and truly set forth, the pecuniary consideration for granting the annuity, as required by the statute.—Verification.

The defendant rejoined, that the said memorial did not truly set forth how the pecuniary consideration for granting the said annuity was paid, because that the plaintiff did not, previous to the granting of the said annuity, lend or advance to or for the use of the defendant and the said E. J. Lack, the said sums of £300, £200, £2000, £1500, and £1000; concluding to the country. Upon this rejoinder issue was joined.

At the trial before *Pollock*, C. B., at the sittings in London after Trinity Term, 1846, a verdict by consent was found for the plaintiff, subject to the opinion of the Court on the following case, of which the pleadings in the action were to be taken as a part.

In the month of April, 1840, the plaintiff had standing in his own name, in the books of the Governor and Company of the Bank of England, the sum of 7787*l.* 10*s.*, reduced £3 per cent. Annuities, and being about to leave England, and desirous of having his said stock sold out, and the proceeds invested upon more productive securities, he, in the said month of April, executed to Robert Phillott, in the indenture in the declaration mentioned, who then and thence until the execution of the said indenture mentioned carried on business as attorney and solicitor with H. M. Elderton, in the said indenture mentioned, a power of attorney authorising him, the said R. Phillott, to receive the dividends of, or to sell the whole or any part of the said stock, and then authorised and requested the said R. Phillott to procure some other investment for the proceeds, and to lay out the same in such other investments; and that authority was never revoked.

The firm of Elderton & Phillott acted as attorneys both for the plaintiff and the defendant, in preparing the annuity deed mentioned in the declaration.

The said Robert Phillott, acting under the said authority, sold out, under the said power of attorney, the sum of 7112*l.* 5*s.*, part of the said sum of 7787*l.* 10*s.* Reduced Annuities, belonging to the plaintiff, and received the proceeds thereof, at the times and for and in the sums following:—

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<i>Date of Sale.</i>	<i>Stock Sold.</i>	<i>Produce of Sale.</i>
	<i>£ s. d.</i>	<i>£ s. d.</i>
26th July, 1841 - - -	2219 5 7	2000 0 0
3rd August, „ - - -	779 19 0	700 0 0
11th „ „ - - -	334 14 7	300 0 0
17th „ „ - - -	2228 8 3	2000 0 0
1st Sept. „ - - -	1549 17 7	1392 19 1
Total - - - £	7112 5 0	6392 19 1

The bills of exchange in the said indenture mentioned were respectively drawn by the said E. J. Lack upon and accepted by the said defendant, payable to the order of E. J. Lack, and indorsed by him and the said H. M. Elderton, at the several dates and for the several sums following:—

Bill for £ 300, dated 22nd July, 1841, at 3 months.
 „ 200, dated 22nd July, 1841, at 3 months.
 „ 2000, dated 29th July, 1841, at 3 months.
 „ 1500, dated 3rd Aug., 1841, at 2 months.
 „ 1000, dated 18th Aug., 1841, at 2 months.

Immediately on the giving of the bill for £2000, in the said indenture mentioned, the said Robert Phillott held the said sum of £2000 as the agent of and in trust for the said defendant and the said E. J. Lack, to be advanced and disposed of by their directions, and became accountable to them for the due disposition thereof, except that as to £100, part of the said sum of £2000, the said Robert Phillott held that sum for himself and H. M. Elderton, with the consent and by the authority of the defendant and the said E.

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J. Lack, as discount, which the said R. Phillott represented to the defendant and the said E. J. Lack he the said Robert Phillott and the said H. M. Elderton paid for the loan of the said sum of £2000 on the said bill, but no part of this discount was ever received by the plaintiff. This was the first advance made by the plaintiff to the defendant and the said E. J. Lack. In like way, on the giving of the bill for £1500 in the said indenture mentioned, the said Robert Phillott held the said sum of £700 as the agent of, and in trust for, the said defendant and the said E. J. Lack, to be advanced and disposed of by their directions, and became accountable to them for the due disposition thereof. As to the said sum of £300, and as to £1000, part of the secondly-mentioned sum of £2000, the said Robert Phillott received and held these sums respectively for the said defendant and the said E. J. Lack, to be advanced and disposed of by their directions, and became accountable to them for the due disposition thereof immediately he the said Robert Phillott received those portions of the proceeds of the said stock, which was some days after he first held the said bill for £1500 on account of the plaintiff. And the said Robert Phillott received and held the remainder of the said secondly-mentioned sum of £2000 as the agent of, and in trust for, the defendant and the said E. J. Lack, to be advanced and disposed of by their directions, and became accountable to them for the due disposition thereof, immediately on the receipt of the said bill of £1000, subject, as to each of the said last four mentioned bills, to a like holding of a part for discount, as in the case of the first-mentioned bill.

The last-mentioned sum of 1392*l.* 19*s.* 1*d.* was received by Robert Phillott on the said 1st day of September, and 242*l.* 19*s.* 1*d.*, part thereof, was then lent by him, as the agent of the plaintiff, to the defendant and the said E. J. Lack, and the residue, £1150, was held by him, on account of the plaintiff, until January, 1842, when the same

was lent by him, as the agent of the plaintiff, to the defendant and the said E. J. Lack.

The said Robert Phillott was duly authorised by the defendant and the said E. J. Lack so to procure and hold the said sums of £2000, £700, £300, and £2000, on account of the defendant and the said E. J. Lack, and the same were loans from the plaintiff to the defendant and the said E. J. Lack, at the several times the said Robert Phillott held the same respectively on account of the defendant and the said E. J. Lack as aforesaid.

Although the said Robert Phillott held the same on account of the defendant and the said E. J. Lack, he did not pay the full amount thereof to them, or apply it for their benefit, but held considerable portions thereof as aforesaid; and he the said H. M. Elderton untruly represented to the defendant and the said E. J. Lack, that they the said Robert Phillott and H. M. Elderton had been obliged to pay the sums so held, for discount of the said several bills.

The said several bills were received by the said Robert Phillott from the defendant and the said E. J. Lack, on or about their respective dates.

The bill for £2000 was given specifically for the said first-mentioned sum of £2000 so lent as aforesaid, and held by the said Robert Phillott, as the agent of the plaintiff, from the time of its date. The bill for £1500 was given, and held by Robert Phillott, partly for advances made, partly in expectation of advances to be made, and which were made as aforesaid; and the bills for £300 and £200 were set apart and held by Robert Phillott, as the agent for the plaintiff, from the 17th of August; and the bill for £1000 was made and given to, and held by him, as the agent of the plaintiff, to make up the amount of £5000, which the plaintiff was to lend and advance, and did lend and advance as aforesaid.

In the month of December, 1842, the plaintiff so being the holder of the said bills of exchange, the said defendant,

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and the said E. J. Lack and H. M. Elderton, proposed to the plaintiff to execute the said indenture, on his, the plaintiff's, cancelling or destroying the said bills, and executing the release of the said defendant, the said E. J. Lack and H. M. Elderton, in the said deed contained.

The plaintiff, being unable to procure any other or better security for the money so obtained by the sale of his stock, acceded to the said proposal, and the said deed was accordingly executed by the several parties thereto, and the said bills of exchange were given up and cancelled as in the recital of the said deed mentioned.

At that time the defendant and the said E. J. Lack were indebted to the plaintiff in 6392*l.* 1*s.* 1*d.* for money lent by him to them, £5000 of which was secured by the said five bills of exchange as aforesaid. The said Elderton and Phillott did, as above stated, obtain from the plaintiff a larger sum than £5000, but they have not up to the present time rendered an account to the defendant of the expenditure thereof, and it is admitted by the plaintiff that no such account can be rendered to make up the sum of £5000, unless the receipt by Elderton and Phillott, or one of them, is to be considered a receipt by the defendant.

The Court were to draw such inferences from the facts as a jury might do.

The question for the opinion of the Court was, whether the plaintiff was entitled to retain the verdict on the second issue, and if he was, whether the judgment ought to be arrested; and if the plaintiff was not entitled to retain the verdict on the second issue, then whether he was entitled to judgment, notwithstanding a verdict for the defendant on such issue.

This case was argued on the 4th, the 9th, and the 11th of June, in Trinity Term last, by

Willes (with whom was *Peacock*), for the plaintiff.—The plaintiff is entitled to retain the verdict on the second issue,

and there is no ground for arresting the judgment. The substance of the issue should be regarded by the Court. The substantial question is not merely whether the specific sums stated in the memorial were advanced to the Lacks, but whether in point of fact the bills mentioned in the memorial were held by the plaintiff as a security for money due from them to him upon a loan to the gross amount of £5000. It appears from the pleadings that it will be contended, that if the sums stated in the memorial differ from those advanced, the memorial does not truly state the consideration upon which the annuity was granted, and consequently the deed is void. The 53 Geo. 3, c. 141, upon which this question is raised, and which repeals the 17 Geo. 3, c. 26, requires the memorial to be inrolled, and to set forth the *pecuniary* consideration. The 6th section of the later act is almost a repetition of the 4th section of the former one. *Kelfe v. Ambrose* (a), which arose under 17 Geo. 3, c. 26, is a similar case to the present. There *Grose, J.*, said, "With regard to the second question, the objection is, that it should have been set forth when the different sums of money were paid; to support which cases have been al- luded to, in which it was ruled that the names of the persons by whom the consideration was paid should be set forth; but what was determined in the latter class of cases ought not to be applied to such a case as the present, where the grantor himself admitted that the consideration was an antecedent debt due from him to the grantee, arising from different sums paid at different times for his use. It would be extending the act of Parliament too far, to decide that this annuity could not be supported, merely because the re- spective times when these different sums of money were advanced by the grantee are not mentioned, when every thing that passed at the time of granting the annuity is sufficiently set forth." So here, it is submitted that the memorial is sufficient. It is found that the defendant did

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owe the aggregate sum, and that Phillott held the bills as the agent of the plaintiff. The money left the hands of the plaintiff, and came into those of the party authorised by the defendant and E. J. Lack to receive it. The case finds that he was the agent of the Lacks. The money which was retained by Phillott, was retained by the consent of the Lacks and not of the plaintiff, who never gave him any authority to take discount. Phillott was therefore liable to the Lacks for the amount which he improperly retained: *Taylor v. Plummer* (a). This, however, is not a case within the act; for the consideration was the cancellation of the securities, and not a pecuniary consideration or money's worth: *Blake v. Attersoll* (b).

Watson (with whom was *Corrie*) for the defendant.—The defendant is entitled to succeed upon the second issue. The case is within the mischief which the act was intended to meet. "The consideration must be stated in the memorial according to the truth," to use the words of Lord *Denman* in *Ex parte Lewis* (c); "otherwise the penal consequence attaches, that the deed is null and void to all intents and purposes. The Court has no discretion, but is obliged to give effect to the clause; and the cases shew that the statement must be precise; the memorial must give *the fact*." In *Drake v. Rogers* (d), where the consideration was stated in the memorial to consist of Bank of England notes, and a draft payable at a banker's, the Court set aside the securities, because it did not appear when the draft was payable, or whether it had in fact been paid. *Kirkman v. Price* (e) shews that the consideration must be truly set forth, though partly made up of securities for money previously advanced. [*Alderson*, B.—Those were decisions under the old Annuity Act, which does not contain the words *pecuniary* consideration.] The money was not all received by the defendant.

(a) 3 M. & S. 562.

(b) 2 B. & C. 875.

(c) 2 Ad. & Ell. 137.

(d) 2 Brod. & Bing. 19.

(e) 1 H. Bla. 309.

It is found that Phillott was the plaintiff's agent, and it should have been stated that the consideration was paid by him on behalf of his principal: *Dalmer v. Bernard* (a). It is not the less a money consideration, because the money was advanced at different times before the annuity was granted. It is not necessary that the money should be advanced at the same time. The very circumstance of the advance being made on different occasions is likely to make such a proceeding the more dangerous. The words of the act are very general. It is not contended that every case of a bygone debt is within the act, but in general the annuity is granted after the money is advanced. *Earle v. Browne* (b) is a case in point. There the Court of Queen's Bench set aside an annuity deed, which had not been enrolled, and the consideration of which was the giving up of an antecedent annuity. Lord *Denman* said: "We shall repeal the statute, if we decide the second annuity need not be registered; for there will be a total absence of that security which the legislature has required." The two statutes are very similar in their provisions, and some of the sections are almost identical. In the third section of the former act, the words "the consideration really and bonâ fide" (*which shall be in money only*) are the same as a pecuniary consideration. The words "for money's worth" are very comprehensive. *James v. James* (c) is distinguishable from the present case: there the grantee assigned his life interest in certain veins of coal; and it was held that the consideration was not "money's worth" within the meaning of the statute. So in *Blake v. Attersoll* (d). In the latter case, Mr. Justice *Bayley*, after referring to the second section, says: "It appears clearly that that section contemplated a consideration paid in money or promissory notes or bills of exchange; and, construing that section with the tenth, I am of opinion that the legislature

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(a) 7 T. R. 248.

(b) 10 Ad. & Ell. 412.

(c) 2 Brod. & Bing. 702.

(d) 2 B. & C. 875.

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intended an annuity bought on the one hand, and sold on the other, for a consideration moving from the grantee to the grantor." And Mr. Justice *Littledale* also says: "The object of the two acts, therefore, being the same, the preamble of the first act may be considered as virtually incorporated in the second; and therefore I am clearly of opinion, that, to bring a case within the 53 Geo. 3, c. 141, there must be an actual sale of an annuity for money, bills, or goods. The form of the inrolment given by the second section shews that the consideration must be either money, or something which may be converted into money."—He also referred to *Symmonds v. Mortimer* (a), and *Washburn v. Birch* (b).

Willes replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This case was argued in last Trinity Term, by Mr. *Willes* for the plaintiff, and Mr. *Watson* for the defendant. It was an action of covenant brought to recover the arrears of an annuity claimed to be due from the defendant to the plaintiff, under the terms of an annuity deed, dated 21st of December, 1842.

By that deed, after reciting that the plaintiff had at various times advanced and lent to the defendant and his son, Edward John Lack, among other monies, five several sums of £300, £200, £2000, £1500, and £1000; as a security for the repayment of which, the plaintiff held five several bills of exchange for the same sums of £300, £200, £2000, £1500, and £1000, bearing date on various days mentioned in the deed, in the months of July and August, 1841; and further reciting, that all interest on these sums had been duly paid up to the 29th September, 1842, and

(a) 5 T. R. 139.

(b) Id. 472.

that the defendant and his said son had some time since agreed with the plaintiff for the sale to him of an annuity of £804, in consideration of the sums so due on the said five bills of exchange, such consideration to be satisfied by the cancellation of the bills, and a release from the same to be executed by the plaintiff; and further reciting, that in pursuance of that agreement, the said bills had been that day delivered up by the plaintiff to the defendant and his son, and had been cancelled; it was witnessed, that the plaintiff, pursuant to the said agreement, released the defendant and his son from the said bills, and all claim in respect thereof. And it was further witnessed, that in consideration of the said sums so released and discharged by cancellation of the said bills, the defendant and his son did grant to the plaintiff an annuity of £804, payable quarterly, on the days therein mentioned, and the defendant covenanted for due payment of the annuity on the specified days. There are a great many other provisions in the deed, but they do not appear to us material to the present case. The declaration, after setting out the deed verbatim, and alleging performance of all its stipulations on the part of the plaintiff, alleges various breaches of the covenants entered into by the defendant, and particularly of the covenant for non-payment of the annuity, to the plaintiff's damage of £4000.

There were several pleas, but the question before us turns entirely on the second, the plaintiff having succeeded on all the others.

By that second plea, the defendant pleads that the deed in question was made after the passing of the Annuity Act of 53 Geo. 3, c. 146, and alleges that the annuity was granted for a pecuniary consideration, and that no memorial was enrolled according to the provisions of the statute, whereby the indenture is null and void.

To this the plaintiff replied, that a memorial was duly enrolled according to the statute, which memorial was and

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is as follows, and then sets out the memorial verbatim; the language under the column "*consideration, and how paid,*" being to the effect following—£5000 made up of five several sums of £300, £200, £2000, £1500, and £1000, previously lent or advanced by C. R. Hall, to or for the use of J. Lack and E. J. Lack, and owing to C. R. Hall, on security of five several bills of exchange, drawn by E. J. Lack upon and accepted by J. Lack, and indorsed by E. J. Lack; the said consideration being paid or satisfied by the cancellation of the same bills, and a release by C. R. Hall of J. Lack and E. J. Lack, from the sums secured thereby, and interest.

The replication then goes on to aver, that the said memorial did duly contain and truly set forth, inter alia, the pecuniary consideration for granting the said annuity.

The defendant by his rejoinder said, that the memorial did not truly set forth how the pecuniary consideration was paid, because the plaintiff did not, previously to the grant of the said annuity, lend or advance to or for the use of the defendant and J. Lack, the said sums of £300, £200, £2000, £1500, and £1000, and of this he puts himself on the country; thus traversing the averments in the replication, that the memorial did truly set forth the pecuniary consideration for the grant of the annuity.

The plaintiff joined issue on the traverse so taken by the defendant, and on the trial of that issue a verdict was by consent taken for the plaintiff, subject to the opinion of this Court as to whether the facts warranted such a finding.

It appeared by the case, that in the year 1840, the plaintiff being about to leave England, and being entitled to certain £3 per cent. Annuities standing in his name, gave a power of attorney to R. Phillott, enabling him to sell out the same, with directions to place the proceeds out at interest on good securities.

Phillott made various sales of the stock in the months of July and August, 1841, the whole net proceeds of such

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sales amounting to £6392; and in those same months made advances by way of loan to the defendant and to E. J. Lack, out of the said net proceeds, to the extent of £5000; save that he claimed to deduct, and actually did deduct, several sums, amounting to £250, which he falsely represented that he had been obliged to pay by way of discount in order to obtain the said loans. The plaintiff was entirely ignorant of the deductions, the whole of the sums retained having been appropriated by Phillott to his own purposes. At or about the time of these advances, Phillott took by way of security for the money advanced, five several bills of exchange, as follows:—i. e. one for £300, one for £200, one for £2000, one for £1500, and the other for £1000. All the bills were drawn by E. J. Lack, payable to his own order. They were all drawn upon and accepted by the defendant, and were indorsed by E. J. Lack, and were handed over to Phillott as agent for the plaintiff, by way of security for the advances.

The bills were dated on different days between the 22nd of July and the 18th of August, 1841. The dates of the bills did not exactly correspond with the date of the advances, nor were the advances made in the exact sums for which the bills were given, but sums to the amount of £5000 (subject to the deductions before adverted to) were advanced nearly about the times when the bills were given, for which sums the bills were intended to be securities.

In the month of December, 1842, the plaintiff agreed with the defendant to accept the annuity granted by the deed set out in the declaration, in satisfaction of the five bills of exchange, and the £5000 thereby secured. The bills were accordingly cancelled, and the deed was executed, and a memorial was enrolled, as stated in the pleadings.

On these facts Mr. *Watson*, for the defendant, argued, either that a verdict ought to be entered for him on the issue as to the memorial, or, if the verdict should be entered

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for the plaintiff, then that the defendant was entitled to arrest the judgment.

The argument for entering the verdict for the defendant rested on these grounds. The sums advanced and covered, or intended to be covered by the five bills, did not, it was said, really amount to £5000, but only to that sum less £250. The memorial, therefore, stating the amount to be £5000, was contended to be untrue, and therefore that the averment that the memorial did truly set forth the pecuniary consideration was not made out. It was further contended, that no such precise sums as those for which the several bills were given ever were advanced; and on this ground also it was contended that the memorial was untrue, for that it ought to have stated the exact amount of each advance; and so, even supposing the aggregate of all the advances to be correct, still that the statement was insufficient.

We are of opinion that neither of these objections can prevail. The money, it must be recollected, was all advanced to the Lacks without any reference to the purchase of an annuity, and merely by way of loan.

The first thing, therefore, to be done, in order to arrive at a just conclusion as to the rights of the parties, is to look at the question apart from any consideration of the annuity, and merely as a transaction of lending and borrowing. And when it is so considered, there can be no doubt but that the defendant was liable on the bills to the full amount. The exact days on which the different advances were made were wholly immaterial; and it was certainly competent to the parties to treat the £5000 as having been advanced in sums and at dates corresponding with the five bills. So, also, it was lawful for the defendant to treat the £250 retained by Phillott as having been advanced to him. If the plaintiff had sued the defendant on the bills, it would have been no answer to the plaintiff, as to any part

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of the demand, to shew that Phillott had retained a part of the money. Even treating it as clear that Phillott was the agent of the plaintiff and not of the defendant, still it did not lie in the mouth of the defendant to say that the plaintiff did not advance the whole of the £5000; he did in fact advance the whole of that sum. What was kept back by Phillott was retained by him for his own use, in fraud of the other parties, and without the privity of the plaintiff. And the defendant, by accepting the bills to the full amount of £5000, must be taken to have agreed to treat the whole sum as received by him. By so accepting the bills, he enabled Phillott to discharge himself as against the plaintiff. He afterwards paid to the plaintiff interest regularly on the whole £5000, treating the whole as having come to his hands; and having done so, he cannot afterwards turn round and say that a part of the sums for which he accepted the bills, and on which he regularly paid interest, was not really received by him, but was intercepted in its progress by the agent.

For these reasons we think it clear, that, at the time when the annuity was granted, the plaintiff had an undoubted claim on the defendant for the £5000 due on the five bills, and this being so, it follows that the consideration is described in the memorial with strict accuracy. Indeed it would have been incorrect to have stated that the advance of £5000, or any part of it, formed the consideration, or any part of the consideration, for the annuity. The whole of the £5000 was a debt justly due before the annuity was thought of, and the consideration for the grant of the annuity is correctly described, not as the advance of the £5000, but as the release of the previously existing debt, and the cancellation of the bills by which it was secured. This case therefore closely resembles that of *Kelfe v. Ambrose* (a), referred to by Mr. *Willes*, where, under the original Annuity

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Act, 17 Geo. 3, c. 26, which requires the consideration to be correctly stated in the body of the deed, it was held that the statement of a pre-existing debt due from the grantor to the grantee, was a sufficient compliance with the act, without shewing how the debt had arisen. The principle acted on in that case, as to the statement of the consideration in the body of the deed, under the 17 Geo. 3, c. 26, s. 3, is equally applicable to the statement of the consideration in the memorial under the more recent act, 53 Geo. 3, c. 141. Indeed, to hold that it is necessary, in the case of existing bygone debts, to state when and how each sum constituting the debt was advanced, would obviously, in many cases, be equivalent to holding that an annuity cannot be granted in consideration of such debts. It might often be quite impossible, more especially in the case of cross accounts, to state when and how all the items of which the debt is made up arose. The statute does not require any such statement. All which it requires is, that the memorial should state the pecuniary consideration, and how paid; and in the present case this has been done with perfect fairness, and with as much detail as the nature of the transaction permitted. The consequence will be, that the verdict on the issue raised by the replication to the second plea must be entered for the plaintiff.

It is hardly necessary to say, that our decision will in no respect apply to any colourable transaction where the real consideration is the advance of sums of money, the particulars of which are incorrectly set out, and where it is attempted to disguise the real transaction under the pretence of a bygone debt: such a statement of the consideration would clearly be insufficient, and the memorial would be bad.

The verdict being thus entered for the plaintiff, there is clearly no ground whatever for the motion in arrest of judgment. Indeed, the only ground on which it was attempted to rest that application was, that on the face of the record the memorial appeared to be insufficient; but the

same reasoning which has led us to the conclusion that the verdict ought to be entered for the plaintiff, necessarily satisfies us that the memorial as it appears on the record is perfectly good.

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Judgment must therefore be entered for the plaintiff, and it is thus unnecessary to consider the further question argued by Mr. *Willes*, namely, that even if the verdict on the issue in question had been entered for the defendant, still the plaintiff was entitled to judgment non obstante veredicto, on the ground that the annuity did not require enrolment at all.

Judgment for the plaintiff.

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Nov. 10.

THIS was an action of debt, brought by the plaintiff as clerk to the commissioners appointed under the 11 Geo. 3, c. 15, and 57 Geo. 3, c. xxix, to recover 10*l.* 14*s.*, to which

By stat. 11
Geo. 3, c. 15,
"for better
paving High-
street, White-
chapel, and re-
moving obstructions and annoyances therein," commissioners appointed under that act were empowered, for defraying the charges and expenses attending the execution of the act, to rate all and every person and persons who do or shall inhabit, hold, occupy, possess, or enjoy any house, shop, warehouse, cellar, vault, or other tenement "within the said street."

The Metropolis Paving Act, 57 Geo. 3, c. xxix, s. 24, enacts, that rates for paving or repairing the pavements of the said streets or public places in any parochial or other district, by virtue of any local act, or of the said act, shall be laid "upon all persons who shall inhabit, hold, occupy, be in possession of, or enjoy any messuages, tenements, lands, grounds, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings or hereditaments, situate or being within any of the streets or places within the said parochial or other district."

To the north of High-street, Whitechapel, and communicating with the street by means of a covered gateway, there is a yard called the "Kent and Essex Yard," around which are several dwelling-houses, warehouses, stables, sheds, a booking-office, and other buildings. The yard, (with the exception of the width of the gateway), and all the dwelling-houses, &c., round the same, are situate at the back of several houses and premises which front High-street. The entrance into the yard is through carriage-gates and along a covered gateway. No part of the yard was ever paved or repaired by the commissioners, nor had they, within the yard, at any time exercised any of the powers conferred on them by the above acts.

Held, that the occupiers of the yard and houses therein were liable to be rated in respect of the paving and repairing of High-street, the premises being, for that purpose, "within the street," inasmuch as they had a frontage on the street, and their sole communication was with the street.

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the defendant pleaded *nunquam indebitatus*; and issue having been joined thereon, the parties, under the order of *Parke, B.*, stated for the opinion of the Court the following case:—

By the 11 Geo. 3, c. 15, (after reciting that part of High-street, Whitechapel, was extremely ill paved, and the passage through the same greatly obstructed by posts and projections, and annoyed by signs, spouts, and gutters projecting into and over the same, whereby, and by the deep channels across many parts of the said street, the same was rendered incommodious and dangerous to persons passing through the same, and that the methods then prescribed by law were ineffectual for removing such obstructions and annoyances, and for the proper paving of the said street, and keeping such pavement in proper repair), certain persons therein named were appointed commissioners for putting the act in execution, and provisions are contained in the act for the electing of commissioners from time to time in the room of those dying or refusing to act; and the said commissioners are empowered by the act to appoint one or more clerk or clerks, and such other officers as they shall think proper; and they are empowered and authorised from time to time to cause and order the said street to be new paved, repaired, raised, sunk, or altered, when and as often, and in such manner, &c., as they shall think fit. The commissioners are also authorised to order and direct the houses within the said street to be numbered with figures, placed or painted on the doors thereof, or on such other part of the said houses respectively as the said commissioners should think proper. For defraying the charges and expenses attending the execution of the several powers granted by the act, it is enacted, that a rate shall, once in every year, or oftener, if it shall be thought needful by the commissioners, be made, laid, and assessed by them upon all and every person and persons who do or shall inhabit, hold, occupy, possess, or enjoy any house, shop, warehouse, cellar, vault, or other tenement within the said street,

for raising such competent sum and sums of money as the commissioners shall from time to time judge needful and direct.

By the 57 Geo. 3, c. xxix, intituled "An Act for better Paving, Improving, and Regulating the Streets of the Metropolis, and removing and preventing Nuisances and Obstructions therein," it is enacted, that the said act and the provisions therein contained shall extend to all streets and public places which then were or thereafter might be paved within the cities of London and Westminster, and borough of Southwark, and any other parts of the metropolis which are included within the weekly bills of mortality; and to all streets and public places which then were or thereafter might be paved within the parishes of St. Pancras and St. Marylebone, in the county of Middlesex (except only any parts thereof which might in that act be particularly excepted). By the 24th section of the last-mentioned act, it is enacted, that it may be lawful to and for the persons who, under any local act or acts for any parochial or other district within the jurisdiction of that act, are empowered to make rates for the expenses of paving or keeping in repair the pavements of any streets or public places within such parochial or other districts, either separately or jointly with other purposes, from time to time after the making and passing of the said act, for and notwithstanding any provisions or restrictions, matters or things, in such local act or acts contained, to make and sign all and every or any such rates or assessments as shall be from time to time necessary or expedient for paving or repairing the pavements of the streets and public places within such parochial or other district, pursuant to the directions of the local act for such district, or of the said act of the 57 Geo. 3, and for the payment of all debts and charges theretofore incurred in and about the execution of such local act, and of the said act, or either of them, as to the paving and repairing the pavements of and in such district, and for the pay-

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ment of interest, &c.; and that such rates may be either substituted for the rates directed by such local act, or may be additional thereto, as the persons making the said rates from time to time at the making thereof may determine and direct; and all such rates, made and signed after the passing of the said act, (of the 57 Geo. 3), for paving or repairing the pavements of the said streets or public places in any parochial or other district, by virtue of any local act, or of the said act, and either separately or jointly with or towards any other object or purpose, by virtue of any local act or acts of Parliament, or of the said act, shall be laid upon all persons who shall inhabit, hold, occupy, be in possession of, or enjoy any messuages, tenements, lands, grounds, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings or hereditaments, situate or being within any of the streets or places within the said parochial or other district, and should be just and equal ground rates. It is, by section 76, further enacted, that the commissioners, &c., may order and direct all and every the houses and other tenements, &c., within the streets and other public places within their respective districts to be numbered with figures, placed or painted upon or over the doors thereof, or such other part of the said houses, &c., as they should think proper. By the 120th section, it is further enacted, that the said commissioners may sue and be sued in the name of their clerk for the time being, and that all actions to be brought for the recovery of any rate may be brought in the name of such clerk, by action of debt, in any of his Majesty's courts of record at Westminster.

That part of High-street which is mentioned in the first of the said acts is, and at the time of the passing of the second of the said acts was, situate and included within the weekly bills of mortality, and then was and still is paved, and then was and is under the jurisdiction of the commissioners for the said district as aforesaid, and is not exempted from or out of the operation of the last-mentioned act.

After the passing of the first of such acts, the commissioners therein named and appointed new-paved, repaired, raised, sunk, and altered the said parts of High-street as by the same act they were empowered, and they and the commissioners for the time being for putting that act in execution have thence continually hitherto from time to time repaved, repaired, raised, sunk, and amended the same, and have removed, taken, carried away, and deposited, as in the said act mentioned, and still do repave, repair, and amend, and remove, take, carry away, and deposit all carts, &c., making or occasioning annoyance, nuisance, or obstruction in the said street, as by that act they are empowered to do.

To the north of that part of the said High-street which lies in the county of Middlesex, and communicating with the said street by means of the covered gateway hereinafter mentioned, there was, long before the making of the rate hereinafter mentioned, and continually thence hitherto hath been and now is, a large yard, called the "Kent and Essex Yard," around and within and opening into which, long before the making of the said rate, there had been erected, and at the time of the making of the said rate there were and still are standing, several dwelling-houses, warehouses, stables, sheds, a booking-office, and other buildings. The said yard, (with the exception of the width of the gateway, which is about ten feet two inches), and all the said dwelling-houses, warehouses, stables, sheds, booking-office, and other buildings round the same, lie and are situate at the back of several houses and premises which front the said High-street; these houses are entirely unconnected in every way with the said yard, dwelling-houses, &c., standing round it and every of them; and all the said houses which front the High-street are duly rated in and by the said rate. The defendant, for upwards of twelve months before and at the time of the making of that rate, and thence continually hitherto, inhabited, held, occupied, possessed, and

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enjoyed certain of the said houses, warehouses, stables, and lofts, and the booking-office within the said yard, being the houses, warehouses, stables, lofts, and booking-office in the said rate and hereinafter particularly mentioned and set forth, and certain other persons, whose names it is unnecessary to specify, inhabited, held, occupied, possessed, and enjoyed other of the said houses, warehouses, and buildings around and within the said yard.

The entrance into the Kent and Essex Yard is through carriage-gates, and along a covered gateway of the length of twenty-two feet or thereabouts. The said gates open internally into such yard, and the gate-posts thereof abut upon the foot pavement of High-street. The gates are left open in the day-time, but are usually closed at night by the defendant or his servants, the defendant keeping the key thereof.

The gateway into the yard is entirely covered over by a portion of the house No. 115, in High-street aforesaid, which house stands in the straight and direct line of, and abuts and fronts upon, that street to the west of, and over the said gates and gateway, and is duly rated in and by the said rate, and the house adjoining to No. 115, on the east of the said gates and gateway, is numbered No. 114 in the High-street, and such last-mentioned house also stands in the straight and direct line of, and abuts and fronts upon, the High-street, and is also duly rated in and by the said rate. The said gates and gateway are not distinguished by any number at all.

[From a plan which formed part of the case, it appeared that the buildings on the one side of the yard abutted on Commercial-street, and those on the other side abutted on Castle-street.]

That part of the footpath of the said street which is opposite to and between the said gates, and the general carriage-way of the said High-street, is not laid down with flag-stones but with ordinary carriage-way pavement, as is

usual in similar cases in the metropolis where a party is entitled to an entrance across the footway; and the carts and other carriages and the horses and cattle of the defendant, in passing through the said gateway, to or from the said yard, houses, &c., have at all times, during his occupation and possession as aforesaid, necessarily traversed and passed over, and do necessarily traverse and pass over, a large portion of the said street so paved and repaired by such commissioners, and the pavement thereof.

No part of the said yard has ever been paved, repaired, raised, sunk, or altered by the said commissioners, nor have they within the said yard at any time exercised any of the powers conferred upon them by the said acts or either of them, and none of the said houses or other buildings round the said yard ever fronted or were differently placed with respect to or more open to the High-street than they are now.

[The case then stated the making of a rate on the 22nd November, 1844, of one shilling in the pound of the yearly rent or yearly value of such houses, shops, warehouses, cellars, vaults, or other tenements respectively, (so far as the same can be known), except only such houses, &c., as are situate on the south side of the said High-street, &c.]

The other occupiers of the houses, warehouses, and buildings in the said yard as above mentioned were and are also rated in the said rate in respect of such last-mentioned houses, &c.

The sum of 10*l.* 14*s.*, being the sum total and aggregate of the several sums at and in which the defendant is rated in and by the said rate as aforesaid, was, and the several sums of which the said sum of 10*l.* 14*s.* is such aggregate, were duly demanded of him before the commencement of this action, but he, upon such demand, refused and continually hitherto hath refused to pay the same, and each of such several sums, and every part thereof. And it is agreed, that all steps, matters, and things necessary to be taken and

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done by the commissioners, the plaintiff, and all other parties, to entitle the plaintiff, as such clerk, to maintain this action, (if the defendant is liable to be rated in respect of the premises so occupied by him as aforesaid, and comprised in the said rate, and therein rated at the aggregate sum of 10*l.* 14*s.* as aforesaid, or any part thereof), were by them and him taken and done previously to the commencement of the action.

Copies of the said acts and of the pleadings in this action accompany this case, and are to be deemed and taken to be part thereof for all purposes.

The question for the opinion of the Court is, whether, under the aforesaid acts, or either of them, the defendant is liable to be rated for or in respect of the premises occupied by him as aforesaid, and mentioned in the said rate, or any part thereof, and in respect of which he was rated or assessed in the said rate as aforesaid. If the Court should be of opinion that the defendant is not liable under the said acts, or either of them, to be so rated, then judgment of *nolle prosequi* is to be entered; but if the Court should be of a contrary opinion, then the plea of the defendant is to be withdrawn, and judgment is to be entered for the plaintiff for the sum of 10*l.* 14*s.*, or for such other and less sum as the Court should fix and direct, in the event of the Court being of opinion that he is liable to be rated for and in respect of some portion only of such premises.

Sir *F. Thesiger* (*Manisty* with him), for the plaintiff.—It is conceded that the commissioners have no power to enter and pave this yard, but they may nevertheless assess a rate in respect of the premises. The 11 Geo. 3, c. 15, is intituled “An Act for the better Paving that part of the High-street, in the Parish of Saint Mary Matfellow, otherwise Whitechapel, which lies in the County of Middlesex, and for removing Obstructions and Annoyances therein.” The first section, after reciting that that part of the High-

street which lies in the county of Middlesex is extremely ill paved, &c., appoints certain persons commissioners for accomplishing the object of the act, namely, the paving and repair of that part of the High-street which is within the county of Middlesex. But though the commissioners have no power to pave or repair any portion of the street which does not lie within the county of Middlesex, they may, by the 34th section, rate every inhabitant "*within the street.*" The question then is, what is the meaning of the term "*within the street?*" It can make no difference that a house is built back from the main line of buildings, either with vacant ground or a garden in front; if the communication be direct with the street, the house is "*within the street.*" [*Rolfe, B.*—It is necessary to diverge a little from the strict meaning of the term. No person lives in a street, but in a house which abuts on a street.] The former part of the 34th section uses the words "house, shop, warehouse, cellar, vault, or other tenement;" the latter part of the section mentions in addition "hereditaments;" but it may possibly be said that the latter word must be construed as ejusdem generis with the former words, and that the act does not apply to ground. The rate, however, is made under both acts, and the 24th section of the 57 Geo. 3, c. xxix, empowers the commissioners to assess a rate in respect of "land" or "ground" situate or being within any of the streets or places within the said parochial or other district. The 30th section points out the mode in which places for religious worship and public buildings are to be rated, and such buildings usually stand back from the ordinary range of buildings in the street. [*Rolfe, B.*—Many houses in London are built in that way; for instance, Devonshire House, and Burlington House: but there can be no question, that for the purpose of rates they are in Piccadilly.] If this yard had not been built upon, the commissioners might have rated it under the 24th section of the 57 Geo. 3, c. xxix, as "land or ground situate

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and being within the street;" and it can make no difference in the principle of assessment that the land has been built on. The words "land or ground within the street," in that act, mean land or ground which communicates with the street. [*Rolfe*, B.—There is a case of *Newton v. Lucas* (a), where a testatrix devised all her messuages in *Denmark-court*. She had five houses, situate in that court, and another which fronted towards and was numbered No. 383 in the Strand, and formed one side of a covered passage leading to the place where the five were situate, and which had attached to it an out-building abutting on ground in *Denmark-court*. The Lord Chancellor (reversing the decision of the Vice-Chancellor) decided that the house fronting towards the Strand passed under the will with the other five.] The reason of the assessment is, that the property derives benefit from the paving. The case of *Paul v. Jones* (b) is relied on by the defendant; but that case only decided that Ely-place was a *private* place, and not within the jurisdiction of certain commissioners for the purpose of paving, under a local act. [*Pollock*, C. B.—It would be difficult to say that houses in Child's-place are houses in Fleet-street. The case of *Serjeant's Inn* is peculiar, because there there is a carriage-way into Fleet-street, and a foot-way into the Temple.]

Butt (*Hawkins* with him), for the defendant.—The facts of the case shew that the houses rated are not connected with or within High-street. On one side they are in Commercial-street; another part abuts on Castle-street. If similar acts were to pass embracing those streets, these houses would be liable to be rated under them. [*Alderson*, B.—In the case of *Doe d. Humphreys v. Roberts* (c), a testator devised all his messuage or dwelling-house, with the ap-

(a) 1 M. & C. 391; 6 Sim. 54.

(b) 1 Q. B. 833.

(c) 5 B. & Ald. 407.

purtenances, in High-street, in the town of H., and all and every his buildings and hereditaments in the same street. He had only one house in High-street; but behind that house he had two cottages, fronting a lane, called Bakehouse-lane. There was no thoroughfare through that lane, the only entrance into it being from the High-street. In that case it was held that the two cottages passed under the will, and *Holroyd, J.*, said, "If there had been an opening from the High-street to these two cottages alone, they would clearly be in the street; and I can see no difference from the circumstance of there being other houses in the court." If the sole access is the criterion, then the making of an entrance into this yard from Commercial-street, in lieu of the present entrance, would take the yard out of High-street. The occupiers of the houses within this yard derive no benefit from the labours of the commissioners. All their powers are confined to "*the street.*" The 10th section of the 11 Geo. 3, c. 15, enables them to direct "*the said street*" to be new paved. The 12th section empowers them, whilst a new pavement is being made, to direct in what places "*in the said street*" carts and wagons loaded with hay and straw shall stand. By the 30th section they may order houses "*within the said street*" to be numbered; and by the 31st section they may remove sign-boards or other things occasioning any obstruction or annoyance "*in the said street.*" None of those powers can be exercised within this yard. [*Pollock, C. B.*—Probably you cannot give to the word "*within*" any meaning which is commensurate with its use on all occasions in this act.] This yard is not vacant "*ground*" within the meaning of the 57 Geo. 3, c. xxix, s. 24, but it is a private yard *behind* the street. The case is governed by *Paul v. Jones (a)*, where it was held that Ely-place, which had but one entrance, was not part of the public

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street. The object of the legislature was to confer certain benefits on the occupiers of houses in High-street, and they alone ought to be rated. The commissioners do not pave or cleanse this yard, and therefore the occupiers are not benefited within the meaning of the act. Since the commissioners have no jurisdiction over this yard for benefit, they can have none for charge. Those acts which impose a burthen must be construed strictly. In *Davey v. Warne* (a) it was held, that a surveyor appointed under the 57 Geo. 3, c. xxix, had no right under the 75th section of that act to remove a ladder placed against a house for the purpose of whitewashing it, as the section applied only to the erection of hoards or scaffolds, or to the placing of posts, bars, rails, or boards, by which an inclosure is made. A surveyor could not, under that section, license any person to erect a hoard in this yard.

Sir F. Thesiger, in reply.—Benefit or no benefit is not a fair test of liability. It is evident, however, that the defendant must be benefited in some degree. *Paul v. Jones* has no bearing on this case. There the question was not as to the liability to a rate, but whether the word “place,” in the 5 & 6 Will. 4, c. xviii, meant a “public place.” The Court decided that Ely-place, being private, was not a “place” which the commissioners could pave under that act. They might, notwithstanding, have power to assess a rate on that “place.” Here it is not contended that the commissioners have any right to enter the yard to pave it, but that they have power to rate it as a place “within the street.” Those words cannot be construed according to their strict literal meaning; it must therefore be ascertained, from the facts of each particular case, whether, according to the obvious intention of the legislature, the house rated is “within the street.” The case of *Davey v.*

Warne is wholly inapplicable. It is argued that the defendant might be subject to a rate for two different streets; but here he is contending against a liability to be rated at all. If, as suggested, the defendant were to make an opening from the yard into Castle-street, or Commercial-street, he would suffer no inconvenience, as the 28th section of the 57 Geo. 3, c. xxix, provides for the rating of property in different districts.

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POLLOCK, C. B.—I am of opinion that the defendant is liable to this rate. The point is exceedingly short, but not, however, as clear. The case turns entirely upon whether the property in question is “within the High-street” within the meaning of these acts of Parliament. These acts might have been more clear if the legislature had used the words “communicating therewith, or abutting thereon;” but I think the meaning is ascertained by viewing the question in this light:—was it the intention of the framers of this act, that a person like the defendant should wholly escape this rate? He clearly derives *some* benefit from the act of Parliament; as one of the public in the immediate neighbourhood he shares in the public advantage. It could never have been intended to institute an inquiry as to the amount of benefit which a particular individual might derive from the labours of the commissioners; if it appeared in general that some benefit accrued to him, the object of the legislature was to throw upon him a share of the burthen. The quantum of benefit can have nothing to do with the liability to the rate; for one person may occupy his premises but six months in the year, another for a less period. It is certainly difficult to give to the word “within” a meaning which would be applicable to every clause in which that word occurs. For instance, the commissioners may have no power to enter this yard, and cause the houses to be numbered with figures. It may then be said that houses “within the street” may be numbered; and if these

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houses cannot be numbered, they are not "within the street" for that purpose; and if so, not for the purpose of being rated. I think, however, that for the purpose of being rated these premises are "within the street," for it is a property which has a frontage on the street. If it were a large establishment like an hotel, for which a narrow entrance from the street would be sufficient, it would be clearly liable to the rate. After certain doubt as to one construction or the other, I have come to the conclusion that the act of Parliament intended to make this property liable, because it is "within the street" in a fair and reasonable sense. It is said that the act imposes a tax on the subject, and therefore if there be a doubt the subject ought not to be called upon to pay. I question, however, whether the rule which is applicable to a public general tax applies to a rate upon an inhabitant of a particular district. If you call upon the subject to pay a tax, you must shew a clear public liability, and if there is any doubt, it is the duty of this Court not to impose it. I am not sure that is the correct rule with reference to a case like the present, where the legislature intended to confer certain benefits on the inhabitants of a particular district, and by reason of such benefits to distribute the burthens among them. For every popular purpose these premises are "within the street." A yard is not a substantive and well-known place, like Warwick-square. If this were one tenement, with a frontage to the street, and an open space before it, it would be clearly rateable; it is not the less so because it is divided. The meaning of the act is, that the person whose premises directly communicate with the street shall be liable to pay.

PARKE, B.—I am of the same opinion. It is quite clear that the words "within the street" cannot be understood in their strict literal sense, because no house is strictly speaking in a street, but abutting upon it. I think that,

for the purpose of this rate, a house is to be considered "within the street" when it fronts on the street, and its sole communication is with the street. If we adopt that as the proper interpretation of the words "within the street," there can be no question in the case. This property must be "within the street," because it has a frontage on the street;—for we must assume that not only the yard, but also the gateway, is the property either of the defendant or the proprietors of the houses. If this yard had not been built on, it would have answered the description of property having a frontage on the street, and would have been liable to the rate as "land" or "ground." It cannot be exempt, because the owner has erected different houses and buildings around it. If we test it by the other criterion the statute applies, because it is a property having its sole communication with the street. The rate is imposed in respect of some benefit derived from the pavement of the street and the removal of obstructions, whereby it is better adapted to receive carts and carriages. Then it is clear, the rate is not to be regulated by the quantum of benefit derived. Cases may be put in which there might be extreme difficulty in saying that the premises are "within the street." Warwick-square is one. Possibly the answer is, that Warwick-square is a place so well known to the public at large, that if the legislature gave power to commissioners to rate Warwick-street, it is reasonable to suppose that they could not have meant to include Warwick-square, unless they mentioned it. My judgment in the present case is founded on this,—that if these premises had been in one occupation, as one house, or one yard, they would have had a frontage on the street, and so have been "within the street;" or, at all events, they come within the second branch of the definition, as premises having their sole communication with the street.

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ALDERSON, B.—I am of the same opinion. It is clear

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that no house is, strictly speaking, "within the street;" we must therefore consider the intention of the legislature in using those words. The intention was to impose a rate on all persons whose access to their houses was improved by the paving and repairing of the street. Therefore the words "every inhabitant within the street" mean every person whose sole access to his premises is from the street. If the whole of these premises had been one house, the case would have been perfectly clear. Suppose a house in a street built upon an embankment, with an entrance by a tunnel underneath, could any one contend that the house was not in the street, because of the embankment and tunnel? This yard communicates by a tunnel with the street; then it is "within the street." What fell from *Holroyd, J.*, in the case of *Doe v. Roberts*, shews the principle upon which we are to proceed; namely, that where the sole access is from the street, the premises are within the street.

ROLFE, B.—I am of the same opinion. According to the true meaning of the act, "houses within the street" are houses to which there is no access except from the street. I do not say that is so in every case; but if a house is only accessible by a gateway from the street, it is *primâ facie* "within the street." Nobody can doubt that Burlington House is in the street called Piccadilly, and that if buildings were erected on both sides of the gateway, it would still be in Piccadilly. The same may be said of Northumberland House, in the Strand. If a space before a house be covered with buildings, the house remains in the street, whether it be approached by an access greater or smaller. The principle will apply *à multo fortiori* when the property to be rated is not merely houses, but also tenements "within the street." This yard is clearly a tenement within the street, and therefore liable to the rate.

Judgment for the plaintiff.

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GREEN and Others, Assignees of OSBORNE, a Bankrupt, v.
LAURIE, Knt., and Others.

Nov. 23.

THIS was an interpleader issue, in which the plaintiffs affirmed that the proceeds of certain goods, seized by the Sheriff of Middlesex under a writ of *fi. fa.* at the suit of the defendants against one W. H. Osborne, and sold after the issuing of a fiat against Osborne, were not liable and subject to be paid over by the sheriff to the defendants. The defendants affirmed that the said proceeds of the said goods were liable and subject to be paid over by the said sheriff to the defendants.

At the trial, before *Pollock*, C. B., at the London sittings after last Hilary Term, it appeared that the plaintiffs were the assignees of one W. H. Osborne, a bankrupt, and that the defendants were the trustees of the Union Bank of London. In 1844, the bankrupt opened an account with the bank; and in April 1846, the defendants having commenced an action against Osborne upon a bill of exchange of which he was the drawer, he consented to a judge's order that judgment should be signed and execution issued on the 1st of July, unless payment should be made before that day. On the first of July, Osborne signed a declaration of insolvency properly attested, and a petition to the Lord Chancellor for a fiat in bankruptcy; and on the same day the declaration of insolvency was filed in the office of the secretary of bankrupts, and a docket struck. The next day a notice in writing of the filing of the declaration of insolvency was served on the manager of the bank, the attorney, and the sheriff. On the same day, after the notice had been given, judgment was signed, and execution issued, under which the seizure of the goods in question was made. The fiat issued on the following day. It was there-

A notice given by a trader, that he has filed a declaration of insolvency, pursuant to 5 & 6 Vict. c. 122, s. 22, where a fiat in bankruptcy issues within two months from the filing of such declaration, is a sufficient notice to deprive the execution creditor of the benefit of 2 & 3 Vict. c. 29, s. 1, so that he is not entitled to the proceeds of goods levied after the notice, but before the fiat issued.

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upon contended, upon the authority of *Conway v. Hall* (a), that the defendants were entitled to the verdict. The Lord Chief Baron, upon the authority of that case, directed a verdict to be entered for the defendants, but reserved leave to the plaintiffs to move to enter a verdict for them.

Martin having obtained a rule nisi accordingly,

Gurney now shewed cause.—The question is, whether the execution creditors had notice of a prior act of bankruptcy committed by the bankrupt, at the time the execution was levied. If it should be held that the notice which they had was a good notice, the levy is invalid. It is, however, submitted that the defendants had no notice of any prior act of bankruptcy. The statute 2 & 3 Vict. c. 29, s. 1, enacts, that “all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, bonâ fide executed, or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any act of bankruptcy by such bankrupt committed;” with this proviso, “provided the person or persons, at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy committed.” The 6 Geo. 4, c. 16, s. 6, required an advertisement to be inserted in the London Gazette of the declaration of insolvency which had been filed, in order to constitute an act of bankruptcy. By the 5 & 6 Vict. c. 122, s. 22, it is enacted, that “if any trader shall file, in the office of the Lord Chancellor’s secretary of bankrupts, a declaration in writing, (in the form of schedule (D.) hereunto annexed), signed by such trader, and attested by an attorney or solicitor, that he is unable to meet his engagements, every such trader shall be deemed thereby to have committed an act

(a) 1 C. B. 643.

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of bankruptcy at the time of filing such declaration, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such declaration." The question turns upon the foregoing section:—and the defendants contend that, upon the true construction of this section, there is no complete act of bankruptcy until the fiat issues. If such construction be correct, the defendants had no sufficient notice of any act of bankruptcy, as the fiat issued subsequently to the notice, and they were, therefore, entitled to the benefit of the stat. 2 & 3 Vict. c. 29. If no fiat had issued, there would not have been an act of bankruptcy. The notice should be such as the execution creditor may act upon at the time it is given; he should not be left in a state of uncertainty and doubt till the fiat has issued. In *Hocking v. Acraman* (a) it was held, that notice of a docket having been struck was not a notice of a prior act of bankruptcy within the meaning of the 2 & 3 Vict. c. 29. The Court there held that the words of the act should be strictly construed. The opinions of the judges in the case of *Conway v. Hall* (b) may be referred to as in the defendants' favour; it is, however, remarkable that in that case the stat. 5 & 6 Vict. c. 122 was not adverted to, although it was in operation at the time. *Tindal*, C. J., with reference to the words of the statute 2 & 3 Vict. c. 29, says, "The meaning of these words appears to me to be, that the party, in order to defeat an execution, shall have notice of a prior act of bankruptcy complete in itself at the time the notice is given to him." And the reasoning of *Cresswell*, J., is to the same effect; he says, "I do not think an execution creditor can be called upon to speculate as to whether or not all the necessary steps will be taken to make the declaration of insolvency an act of bankruptcy." *Erle*, J., also says, "It is important that the creditor should have such information as will

(a) 12 M. & W. 170.

(b) 1 C. B. 643.

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enable him to determine on his right *at the time*." The notice of the act of bankruptcy, like a notice to quit, should be complete and perfect, and such a one as can be safely acted upon at the time it is given: *Doe d. Mann v. Walters* (a); *Doe d. Lyster v. Goldwin* (b). The case of *Follett v. Hoppee* (c) may be mentioned; it was decided yesterday in the Court of Common Pleas, and certainly is in the plaintiff's favour.

Martin, (Crompton and Bramwell with him), contra.—The case of *Follett v. Hoppee* is conclusive. [He was then stopped by the Court.]

POLLOCK, C. B.—This rule must be absolute. At the trial I decided in favour of the defendants, on the authority of *Conway v. Hall* (d). In that case, however, the statute 5 & 6 Vict. c. 122, s. 22, was not referred to. It appears to me that the case is plain, without reference to *Follett v. Hoppee*.

PARKE, B.—I perfectly agree. It is clear from the report of *Conway v. Hall*, that the attention of the Court was not called to the 22nd section of the 5 & 6 Vict. c. 122. It is upon that section that the question turns. That section is as plain as words can make it. It enacts, that if the trader shall file a declaration of insolvency in a particular manner, "every such trader shall be deemed thereby to have committed an act of bankruptcy *at the time of filing such declaration*, provided a fiat in bankruptcy shall issue against such trader within two months from the filing such declaration." In the present case the fiat issued within two months from the filing of the declaration of insolvency, consequently there was an act of bankruptcy at

(a) 10 B. & C. 626.
 (b) 2 Q. B. 143.

(c) 11 Jur. 974.
 (d) 1 C. B. 643.

the time of the filing of such declaration. The defendants had notice of the act of bankruptcy before the levy, and are therefore deprived of the benefit of 2 & 3 Vict. c. 29. The rule must therefore be absolute.

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ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

BARBER v. GRACE.

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CASE for the infringement of a patent. The defendant pleaded not guilty, and several other pleas. At the trial before *Pollock*, C. B., at the sittings at Guildhall after Michaelmas Term last, it appeared that the plaintiff was the assignee of a patent which had been granted to one W. Bates. The title of the patent was "Improvements in the process of finishing hosiery and other goods manufactured from lamb's-wool, Angola, and worsted yarns." The specification thus described the invention:—"I, the said William Bates, do hereby declare that the nature of my said invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, reference being had to the drawings hereunto annexed, and to the figures and letters marked thereon; that is to say, my invention consists in submitting hosiery and similar goods made of elastic stocking fabric, and known by the names of lamb's-wool, worsted, and Angola, to the finishing process of a press heated by steam, hot water, or other fluid, in the manner hereinafter men-

The specification of a patent for "improvements in the process of finishing hosiery, and other goods manufactured from lamb's-wool, &c.," stated the invention to consist in submitting hosiery, and other similar goods, to the finishing process of a press heated by steam, &c., in the manner hereinafter mentioned. A description was then given, by letters, of a drawing which represented a press, which consisted of a box heated by steam, up to which another box similarly

heated was to be pressed by means of hydraulic pressure, or by screws, or other well known means. After describing the method of pressing the goods between these hot boxes, the specification concluded by confining the inventor's claim to the process *as above described*:—*Held*, that a method of finishing hosiery goods, by passing them through heated rollers, was not included in this patent, and therefore was no infringement of it.

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tioned, whereby the surface is laid smooth, and the colour brightened, and they have a far superior finish to the ironing or other process to which such goods have heretofore been submitted" * * * (a).

After the description given of the machine, the specification proceeds thus :—"Any number of steam boxes may be attached as may be found convenient to be worked by the same process. The machine may be worked either by hydraulic power, or by a screw. Having thus described the description of the press I prefer for the purpose of my invention, I would remark, that it will be evident, that in place of the pressure being obtained by hydraulic means, the hot boxes may be pressed together with the goods between them, by a screw or screws, or by other well-known means; and in place of steam, hot water, or other fluid, may be caused to circulate in such boxes; and it will be desirable further to remark, that I use steam of 12 pounds pressure to the square inch. I will now proceed to describe the process of applying the hot boxes to the purposes of my invention; and I will explain the same as being performed on stockings; the only difference in applying the process to other goods, made of a like description of fabric, consists of the shape or form put into the goods. Supposing the process is to be performed on lamb's-wool or on worsted stockings, I place each (inside out, and in a dry state) on a leg or shape of wood, or other suitable material, about a quarter of an inch thick; a number of stockings thus prepared I place between the hot boxes in a single layer; I then cause the boxes to press the same between them for some minutes—three minutes will generally be found sufficient. If An-

(a) Here follows a description of the drawings, which represent an iron steam-box, supported upon iron columns. Beneath the box there is another box, upon which the goods are to be placed, and which is capable of be-

ing pressed against the upper one by means of an hydraulic press; the two boxes are connected with a steam boiler by pipes. The several parts of the machine are referred to by letters.

gola goods are to be submitted to the hot-pressing process, they are to be put on to the legs or shapes in a damp state; in other respects the process is the same as that above described for lamb's-wool and worsted.

"Having thus described the nature of my invention, and the manner of performing the same, I would remark, that I am aware that clothes made of wool, but woven with warp and weft, have been heretofore pressed by boxes or surfaces heated by steam or water; and I am also aware that stockings and other goods, made of a similar elastic or looped fabric, have been placed between plates of iron, heated by fires or ovens; I do not, therefore, claim the finishing of such goods by heat generally, but what I do claim is, the submitting hosiery and similar goods, made of elastic stocking fabric, to the pressure of hot boxes or surfaces heated by steam, water, or other fluid, as above described."

It appeared that the defendant's method of finishing hosiery goods, and which was the alleged infringement, was by pressing them between rollers heated by steam introduced into them. These rollers were pressed together by springs which were regulated by screws, in order to obtain the required degree of pressure.

The defendant's counsel contended that this was no infringement of the plaintiff's patent, as rollers were not within it. The Lord Chief Baron was of that opinion, and directed the jury that they ought to find a verdict for the defendant, unless they were of opinion that the use of rollers was a mere colourable evasion of the patent, and his lordship also expressed his opinion that it was not. The jury thereupon found a verdict for the defendant. The plaintiff had a verdict upon the other issues.

Whitehurst having obtained a rule calling on the defendant to shew cause why there should not be a new trial,

Thesiger and *Webster* (with whom was *J. H. Russell*) shewed cause.—The only question is, whether, upon the

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face of this specification, there is a claim for a patent for pressure by rollers heated by steam. If there is, the defendant has been guilty of infringing this patent. The specification, however, clearly does not include the case of rollers, and it cannot be gathered from it that they were in the most remote degree contemplated by the inventor. In the commencement of this instrument the inventor states, that the invention consists in submitting hosiery goods to the finishing process of a press heated by steam or other hot fluid, "in the manner hereinafter mentioned;" and at the conclusion he says, "as above described." There is a complete description of a particular kind of press by which the process is to be carried out. It will be contended by the plaintiff, that the term "boxes" includes rollers; in short, that hollow rollers are boxes, and consequently the use of them is an infringement. But the meaning of the term must be taken with regard to the drawings annexed to the specification: *Bloxam v. Elsee* (a), *Morgan v. Seaward* (b). The drawings are part of the specification, and the meaning of the term "boxes" is narrowed and restricted by reference to the drawings. [Alderson, B.—It seems to me to be perfectly clear that rollers are not included in this specification; the pressure is to be continuous, and to be exerted upon the whole of the article, at one and the same time; such a pressure is not to be obtained by rollers, which press for a moment only, and upon a single point.] The inventor states that three minutes will generally be found sufficient for the duration of the pressure. The pressure should be continuous. The inventor never contemplated rollers, which essentially differ from the press described, and their use was not adopted for the purpose of a colourable evasion of the patent. Parke, B., in delivering the judgment of this Court in *Heath v. Unwin* (c), says, "Then comes the ques-

(a) 1 C. & P. 550, per *Abbott*, per *Alderson*, B.; 2 M. & W. 544.
 C. J.

(b) 1 Webster's Pat. Ca. 173, (c) 13 M. & W. 593.

tion, whether he has indirectly infringed the patent, by imitating and using the same process substantially, but making a colourable variation. Now there is no doubt, we think, if a defendant substitutes for a part of the plaintiff's invention some well-known equivalent, whether chemical or mechanical, he would probably be considered as only making a colourable variation." This cannot be called a colourable variation. If the Court were to hold the use of rollers to be an infringement of the patent, it must be on the ground that the plaintiff claims a method, a pressure by heated surfaces. In that case, the patent would not be good; and the Court should not adopt such a construction of the patent as to render it void, if such a construction can be put fairly upon it as will uphold it: *Neilson v. Harford* (a), *Stead v. Williams* (b).

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Whitehurst, Humphrey, and Miller, in support of the rule.—This patent includes the case of pressure by heated rollers. It is admitted that the question turns entirely upon the true construction of the specification. It is not material to consider whether the patent be good or not, as that question does not arise upon the issue raised by the plea of not guilty. It may be that the claim is too large; but it is contended that it includes pressure by any heated surface, and is not confined to boxes alone. Under the old mode of proceeding, the goods were finished by placing them between plates of iron heated by fires or ovens; the term "hot boxes" is used by way of distinguishing the two modes of proceeding. Supposing, however, that boxes are part of the claim, hollow rollers come within its meaning, as they, in point of fact, are boxes. The inventor does not tie himself down to any particular form of box, and the use of a box which is circular is an infringement. The words "in the manner hereinafter mentioned," refer to the process carried on by any form of press, and the patent would

(a) 8 M. & W. 806. (b) 7 Man. & G. 818; 8 Scott, N. R., 470.

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be good if these words were omitted. The pressure by rollers may be continued during any length of time, and the duration of the pressure may be regulated by the speed of the rollers. The pressure by the press may be but for a moment, and there is no definite time fixed for the continuance of the pressure. Now, if the pressure were but for a moment, that would be no argument that there had not been an infringement. This patent produces a new result, which has been obtained by the defendant by using similar means. They referred to *De Rosne v. Fairie* (a), *Hall v. Boot* (b), *Crane v. Price* (c).

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. It appears to me that the real question before us depends upon the construction of the specification. The question is, whether it includes the case of pressure by rollers.

The specification must be judged of entirely by itself. A fact, therefore, to which I am about to advert should not govern the decision of the Court. It is difficult not to perceive that the patentee himself did not intend to include the case of rollers, as they are not mentioned in the specification, and were certainly not used by him until two or three years after the patent was actually in use. That fact should not in the least degree govern the case; on the other hand, had rollers been used immediately after the patent had been granted, the construction we put upon the specification ought not to be affected by that fact. This is obviously a discovery based upon a discovery. Rollers were adopted two or three years after boxes had been made the subject of a patent. Were the Court to hold that rollers are included in this patent, the effect of it would be, that if the party could have kept his process a secret in point

(a) 1 Webst. Pat. Ca. 162 ; 1
 C., M. & R. 476.

(c) 4 Man. & G. 581 ; 5 Scott,
 N. R., 338.

(b) 7 Webst. Pat. Ca. 100.

of fact, and have given the public nothing but what they could gather from the specification, he might have had the exclusive use of rollers under the protection of the law for fourteen years, and at the end of that period the public would be wholly ignorant that rollers were capable of being used, and had been used, for such a process, or that they were the object of a patent. The question is simply whether, upon consideration of the specification, it follows as a conclusion that rollers are included, either in words, or that they were contemplated by the inventor.

The specification, I observe, follows the mode which is commonly adopted in drawing these instruments, which is to state, in some general language, what is the object of the invention, and to point attention to the subject matter in such a manner as to give as little information as possible. The invention consists in submitting hosiery to the finishing process of a press, and the specification proceeds to describe the machine and the method of applying hot boxes, which are to press the articles subjected to them for some minutes—three minutes is stated to be about the time required for the continuance of the pressure. The specification concludes thus:—"I am aware that cloths made of wool, but woven with the warp and weft, have been heretofore pressed by boxes or surfaces heated by steam or water." The learned counsel for the plaintiff contended that the expression "boxes or surfaces" means boxes or ~~any~~ surfaces. That is a construction the correctness of which I very much doubt. It appears to me that the terms "boxes or surfaces" are meant to shew that the inventor is aware that the surface, and not the box, is the operative part, and he consequently says, "I do not therefore claim the finishing of such goods by heat generally; but what I do claim is, the submitting hosiery, and similar goods made of elastic stocking fabric, to the pressure of hot boxes or surfaces heated by steam, water, or other fluid, as above described." Upon looking at the description given of the

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machine, rollers are not in the most remote degree suggested as capable of being used. The figure represents an hydraulic press, by which two boxes heated by steam or hot water are made to meet, and between them the goods are to be placed. The pressure, as was observed by my brother *Alderson* during the argument, is to be *continuous* and not momentary, as it is in the case of rollers. It was contended by the plaintiff's counsel that the term boxes includes rollers. A roller is a box in one sense of the word, no doubt, but not, I think, in the sense used here. I am of opinion that rollers are not included in the specification. The jury found that the use of rollers was not a colourable evasion, and with that verdict I am not dissatisfied.

Under these circumstances, I am of opinion that the construction put upon this patent was correct, and that the jury came to a right conclusion, and that there is no foundation for a new trial; the rule therefore must be discharged.

PARKE, B.—I entirely agree with my Lord Chief Baron. If the question before us now were, whether this patent would be good if the construction which the learned counsel for the plaintiff puts upon the specification were to be adopted, I should wish to take some little time to consider it. I do not, however, feel bound to give any opinion on that question at present. It is contended by the plaintiff's counsel, that, according to the true meaning of the specification, the inventor claims every method of applying heated surfaces by means of steam, or hot water, or hot liquid, to knit fabrics, that had been previously applied to woven fabrics. It may be a question whether the patent would be good for that, but upon that question I abstain from giving any opinion. According to the true construction of this patent (which is a matter entirely for the Court), I think that, reading the specification fairly, it is a claim for a particular machine which is therein described, and not for a process which is to apply to every species of surface. The

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specification begins by stating that the "invention consists in submitting hosiery and other goods, made of elastic stocking fabric, and known by the names of lamb's-wool, worsted, and Angola, to the finishing process of a *press*;" that is, it is a machine which presses the article, and "that such press is to be heated by steam, hot water, or other fluid, in the manner hereinafter mentioned." The machine is particularly described. The specification then states the effect produced by this process upon the articles to be, that "the surface is laid smooth, and the colour brightened, and a far superior finish is given than by any other process could be given to goods of the same description." The nature of the machine is very particularly described, the goods being pressed between two boxes heated with steam, the lower one of which is forced upwards by means of an hydraulic press, or any other well-known means. The inventor then says, "this is the description of press I prefer for the purpose of my invention." He states that he does not confine himself to any particular method, and he remarks, that, instead of the pressure being obtained by an hydraulic press, it may be obtained by any other mode in which surfaces are pressed together with the goods between them. After disclaiming any intention to claim by his patent or discovery any mode that had been previously applied to stocking fabrics, or the mode in which heat was applied to woven fabrics, he says, "what I do claim is the submitting hosiery and similar goods, made of elastic stocking fabric, to the pressure of hot boxes or surfaces heated by steam, water, or other fluid, *as above described*." By that allegation the claim is clearly confined to the operation of the same machine of which a particular description had been previously given. It seems to me, therefore, that the claim is for that particular machine. It would no doubt be a piracy of that machine to alter the shape of the boxes in such a manner as still to produce precisely the same effect; as for example, suppose, instead of a square box like the

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one which is given in the drawing annexed to the specification, one were constructed of a cylindrical shape pressing upon the other box—or a box in the shape of a hemisphere pressing upon another hemisphere; these would be infringements, because they would fall precisely within the principle of the invention, and would be substantially the same. It however seems to me, that the word *surfaces* is used for the purpose of shewing that the claim of the inventor is not merely to a box of that particular shape, but to any other similar machine by which heated surfaces could be pressed on goods, so as to comprehend a surface belonging to any vessel of any shape that might be preferred. But it is clearly the principle of the patent, that the pressure of every part of the pressing substance upon the substance to be pressed is to be simultaneous, and for a continuous period. Now the machine which the defendant has used is one perfectly different in principle, for it is constructed with rollers, which do not press simultaneously upon all parts of the goods which pass between them, but merely touch the goods on a single point. It therefore appears to me that this case is not within the meaning of the specification, and that the jury were perfectly correct in finding that it was not substantially a colourable imitation. It seems to me, and I own I feel not the least doubt about it, that this specification does not claim a general mode of applying hot surfaces to knitted fabrics, but that it is merely for the particular machine described in the specification, and that that particular machine has not been pirated by the defendant.

ALDERSON, B.—I am of the same opinion. The invention is twice described in the specification; at the commencement it is alleged, “that the invention consists in submitting hosiery and similar goods, made of elastic stocking fabric, and known by the names of lamb’s-wool, worsted, and Angola, to the finishing process of a press heated by steam,

hot water, or other fluid, in *the manner hereinafter mentioned*;" at the end of the specification the inventor claims "the submitting hosiery and similar goods, made of elastic stocking fabric, to the pressure of hot boxes or surfaces, heated by steam, water, or other fluid, *as above described*." Therefore, both at the beginning and at the end of the specification, the claim is for a particular mode in which hosiery is to be submitted to pressure by means of a press—and the mode in which that is to be done is also described. A particular description of the press is given. I do not mean to say that the party is bound by the exact description of the press. Any thing which would be a mere colourable evasion of that machine would be an infringement of the patent with respect to the press.

The next description in the specification is of the mode in which articles to be pressed are submitted to this press. The mode is as follows: the hosiery article is put upon a shape of wood; a number of them thus prepared are placed between the boxes in a single layer; the boxes, being properly heated, are squeezed or pressed together by means of hydraulic presses, or of a screw, or by any other well-known mechanical contrivance. These boxes, therefore, press equally at one and the same time every particle of the article which is between them. It is clear from the description of the machine, that this pressure can be made to continue momentarily, or for a long or short time at pleasure. Such being the nature of the invention, the question is, whether the jury might not very reasonably find, that to place hosiery goods between two rollers which pressed them was no infringement of this patent. The rollers do not press on the whole of the article to be pressed at one and the same time, but on each portion of the article successively, and for not more than a momentary time. The conditions of the invention are, therefore, not complied with, which require the whole article to be pressed at one and the same time, and for a long or short period as may be found necessary. It

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therefore seems to me, that the jury were well warranted in saying, that a machine which so materially differed from that for which the patent was taken out is no infringement of the patent. Had they come to any other conclusion, I think they would have been wrong.

ROLFE, B.—I am of the same opinion. The specification begins thus:—"I hereby declare that the nature of my said invention, and manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, reference being had to the drawings hereunto annexed, and to the figures and letters marked thereon, that is to say." And the specification contains a general description of the drawing, which represents a particular kind of press. The contest now is, that the invention, and the manner in which the process is to be carried on, although they may be ascertained by reference to the drawings, may also be ascertained by matter wholly irrespective of the drawings, and by some other machine which is not in the least degree connected with, or similar to, the one therein described. The specification states that the invention consists in submitting hosiery, &c., to the finishing process of a press heated by steam. It appears very doubtful to me whether, in common popular parlance, two rolling cylinders would be termed a press; they certainly could not, as having any reference to the description contained in these drawings. After describing the drawings, the inventor says:—"Having thus described the press I prefer;" and then he proceeds to state that there may be a variation from it. It would, doubtless, be an infringement, if a press were used by a person, although the exact form of that here described were not retained. Many varieties of press might be suggested which would be an infringement. In order to constitute an infringement the machine should be a press within the meaning of that word, namely, such a press as is described in the drawings. I fully concur in the view

taken by my brother *Alderson*, that it is obvious from the whole scope of the specification, that the press for which the invention is claimed is a press which might press for three minutes *continuously*. The machine which the defendant has used can only exert a momentary pressure. It appears to me that it does not fall within the terms of the specification, taking the terms of the claim into account, which are for a means of pressure particularly described. I therefore can feel no doubt that the invention which is claimed has not been infringed by these rollers, as they have no resemblance whatever to the instrument described in the specification.

Rule discharged.

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Nov. 25.

ON the 29th of April, 1840, the plaintiff issued the writ of summons in this cause, which was served on the defendant on the 6th of May in the same year. On the 9th of May in that year the defendant, before appearance, gave a cognovit in the usual form. No further step was taken until the 10th of May, 1847, on which day the plaintiff wrote a letter to the defendant, stating that he should proceed on the cognovit. On the following day the plaintiff entered an appearance and signed judgment, and on the 15th of May issued a ca. sa., upon which the defendant was afterwards arrested. On the 19th of May a summons was taken out to set aside the proceedings and discharge the defendant out of custody, and *Platt, B.*, before whom it was heard, made an order accordingly. In last Trinity Term the present rule was obtained, calling on the defendant to shew cause why the order of *Platt, B.*, should not be rescinded.

A plaintiff may enter up judgment on a cognovit given before appearance, and upon which no step has been taken for more than a year, without first giving a term's notice, or obtaining leave of the Court or a judge.

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Willes shewed cause (Nov. 3).—In order to support this rule, the other side must contend that the plaintiff could, on the 11th of May, 1847, enter an appearance, sign judgment, and issue execution on a cognovit given on the 9th of May, 1840. If judgment had been entered up in May 1840, the plaintiff could not have proceeded to execution unless he had first issued a scire facias; for after the lapse of a year and a day, the law presumes either that the judgment is satisfied or released. By the rule of Hil. Term, 2 Will. 4, r. 35 (a), “a plaintiff shall be deemed out of court unless he declare within one year after process is returnable.” That rule was made under the provisions of the 11 Geo. 4 & 1 Will. 4, c. 70, s. 11, which empowered the judges to make rules of practice, and which declares that “rules and orders so made shall be observed in all the courts.” Therefore, at the time when the appearance was entered the cause was out of court. [*Parke*, B.—Suppose there had been judgment by default on the 11th of May, 1840, and then a cognovit given?] In that case a term’s notice would have been necessary. [*Parke*, B.—Not so, after a cognovit.] In *Archbold’s Practice* (b), it is said that the rule as to a term’s notice applies to proceedings after interlocutory judgment, as notices of inquiry, &c. In this case the cognovit was given before appearance, and it was a confession of the particular action which, after the 7th of May, 1841, was out of court. The case of *Richardson v. Daley* (c), which was cited on moving for this rule, is not applicable. There the defendant gave a cognovit more than four months after the issuing of a writ of capias against him, and the question was, whether or no the cognovit was inoperative, as the writ of capias had expired; but the Court held, that the plaintiff might enter an appearance and proceed to execution, on the ground that if the de-

(a) Gen. Rules, p. 68. (b) P. 132, 8th ed. (c) 4 M. & W. 384.

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defendant chose voluntarily to come into court and give a cognovit, he might do so. That case is no authority to shew that an appearance may be entered after a cause is out of court. An opinion formerly prevailed that a cognovit could not be given until after declaration, but *Webb v. Aspinall* (a) decided that it might be given before. [*Parke, B.*—A cognovit after declaration is analogous to a verdict.] A cognovit before declaration is only a confession of the truth of a declaration to be afterwards filed, and that must be done within the time.

The rule as to entering up judgment on a warrant of attorney is applicable to cognovits. By Reg. Gen., H. T., 2 Will. 4, r. 73, "leave to enter up judgment on a warrant of attorney above one and under ten years old, must be obtained by a motion in term, or by order of a judge in vacation." In *Webb v. Aspinall* it was held, that the rule of Hil. T., 14 & 15 Car. 2, relating to the execution of warrants of attorney, extended to cognovits, although not mentioned in the rule. This cognovit did not entitle the plaintiff to sign judgment in any subsequent term. *Roberts v. Spurr* (b) shews that an appearance must be entered, otherwise the judgment is a nullity.

Bramwell (*The Attorney-General* with him) in support of the rule.—It is conceded that if a declaration had been delivered, judgment might have been entered up after the lapse of a year and day. A cognovit presupposes a declaration, for it necessarily implies the existence of something capable of being confessed. [*Alderson, B.*—Is not the real effect of a cognovit to constitute the plaintiff attorney for the defendant for the purpose of proceeding with the action? If so, the defendant, by his attorney, comes into court, and confesses that the action is in court.] The practice in the Court of Queen's Bench is in accordance with that pursued

(a) 7 Taunt. 701.

(b) 3 Dowl. P. C. 551.

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in the present case. The Reg. Gen., Hil. T., 2 Will. 4, r. 35, was intended to apply only to cases where a declaration is to be actually delivered in the ordinary progress of a suit. The words "unless he declare" mean unless he delivers a declaration when bound so to do by the practice of the Court. That cannot apply to a case like the present, in which the plaintiff is not bound to declare at all. Moreover, it is but a rule of practice, which the parties by their conduct, or the Court, may dispense with. In *Morton v. Grey* (a) no question was raised as to the power of the Court to enable a plaintiff to declare after the lapse of a year and a day. [*Parke, B.*—The question is, whether the rule as to warrants of attorney extends to cognovits given before declaration.] The 72nd rule of Hil. T., 2 Will. 4, mentions both warrants of attorney and cognovits, and treats them as distinct instruments. The 73rd rule omits all mention of cognovits, and according to the ordinary rules of construction, applies to warrants of attorney only. The reason may be found in the different nature of those instruments, the one presupposing an action commenced, the other being a mere authority to enter up judgment. The rule as to a term's notice applies only where some step is about to be taken by the plaintiff, which would require something to be done by the defendant, for which he must prepare himself. It is a rule applicable to hostile proceedings only, not to proceedings taken under an authority given by the defendant.

Cur. adv. vult.

POLLOCK, C. B., now delivered the judgment of the Court.—In this case, which was argued on the second day of term, we are of opinion that the rule ought to be made absolute. The question turns upon this, whether, where a cognovit is given before there is an appearance, upon

(a) 9 B. & C. 544.

which nothing has been done for more than a year, it is open to the plaintiff to act upon the cognovit without a term's notice, and without any application to the Court or a judge on the part of the plaintiff, for leave to enforce the cognovit. Now a cognovit may certainly be given before appearance; and it contains an implied authority to enter an appearance. It admits a cause of action stated upon the record in the form of a declaration, and though there be not one, it is an admission on the part of the defendant, which operates as if there was one. There is, therefore, an authority to enter an appearance. If there had been an appearance, and a declaration, and then a cognovit, it seems to be clear that no term's notice would be necessary, and that a party would not be prevented by any lapse of time from entering up judgment on the cognovit. It appears to us that the absence of a declaration in this case cannot be successfully relied upon, because the defendant admits, in fact, that there is a declaration; that there is a cause of action on the record; and that is an implied authority to the other side to enter an appearance and proceed to judgment, exactly as if there was a declaration. Neither the rule of court 2 Will. 4, r. 35, nor any statute, nor any analogy arising out of the case cited, of *Webb v. Aspinall*, seems to us to apply. We think, therefore, the order was not a correct one, and the rule for setting aside the order must be absolute.

Rule absolute.

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Nov. 12.

DUKE, Knt., and Others, v. FORBES.

A declaration stated, that before the making of the promise of the defendant, to wit, on the 20th of August, 1845, the plaintiffs had agreed together with divers, to wit, 200 other persons, to endeavour to form and establish a joint-stock company for making a railway, and to obtain an act of Parliament for that purpose; the capital to be divided into shares of £20 each, and a deposit of 2*l.* 2*s.* per share to be paid by such persons as should apply for and to whom the shares should be allotted by a committee of management: that the defendant applied to the plaintiffs

then being the committee of management, and requested them to allot him fifty shares, and then undertook to accept the same or a less number; and thereupon, to wit, on the 25th of November, 1845, the plaintiffs at the request of the defendant allotted him thirty-five shares in the said company, upon certain terms then agreed upon between them, that is to say, that a deposit of 2*l.* 2*s.* on each share so allotted should be paid on or before the 9th of December, 1845, to the account of the company, to certain bankers then agreed upon; and thereupon, in consideration of the premises and that the plaintiffs at the request of the defendant had promised the defendant to perform the said terms on their part, the defendant promised the plaintiffs to perform the said terms on his part. Averment of plaintiffs' readiness and willingness to perform the terms; and breach, the non-payment by the defendant of the deposit.

Held, that the declaration was good on general demurrer, although it did not allege that the company was provisionally registered under the 7 & 8 Vict. c. 110, or that it was formed before that act came into operation; for illegality will not be presumed: if it in fact exists, it should be made the subject of a plea. Also, that the declaration disclosed a contract upon which the plaintiffs alone might sue, without joining the other members of the company.

Held, also, on special demurrer, that the declaration was not bad for not alleging that the company was continuing when the shares were allotted to the defendant; nor for not shewing with sufficient certainty that the defendant accepted the shares allotted; nor for not stating what the terms were which the plaintiffs undertook to fulfil.

ASSUMPSIT. The declaration stated, "that heretofore and before the making of the promise by the defendant hereinafter mentioned, to wit, on the 20th day of August, A.D. 1845, the plaintiffs had agreed together with divers, to wit, 200 other persons, to endeavour to form and establish a certain joint-stock company or partnership undertaking, for the making, constructing, and working a certain railway, to be called the Dorking, Brighton, and Arundel Atmospheric Railway," and endeavour to obtain an act of Parliament for that purpose, the said railway not being capable of being constructed without the authority of Parliament, and the capital of which said proposed company or partnership undertaking was to consist of a certain sum of money, to wit, £1,000,000 sterling, to be divided into 50,000 shares of £20 each, and upon which a deposit of 2*l.* 2*s.* for each and every share was to be paid by such persons respectively as should apply for and to whom the said shares should be allotted by a committee of management of the said proposed company: that before and at the time of the defendant's application for shares, and the making of his said promise as hereinafter mentioned, the plaintiffs formed and

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were the committee of management of the said proposed company: that before the making of the promise by the defendant as hereinafter mentioned, to wit, on the 8th day of October, A.D. 1845, the defendant applied to the plaintiffs, then forming and being such committee of management as aforesaid, and requested them to allot to him the defendant fifty of the said shares in the said proposed company, and then undertook to accept the same or any less number that might be allotted to him, and thereupon heretofore, to wit, on the 25th day of November, A.D. 1845, the plaintiffs, at the request of the defendant, allotted to him thirty-five of the said shares in the said company, upon certain terms then agreed upon by and between the plaintiffs and the defendant, that is to say, that a deposit of 2*l.* 2*s.* upon each and every of the said shares so allotted to him as aforesaid, making in the whole a large sum of money, to wit, the sum of 73*l.* 10*s.*, should be paid by him the defendant on or before the 9th day of December, A.D. 1845, to the account of the said company, to one of certain bankers then appointed and agreed upon in that behalf, to wit, the London and County Joint-Stock Bank, Lombard-street, and Brighton, at their several county branches, and Messrs. Hall, West, and Borrer, Union Bank, Brighton; of all which premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice; and thereupon, in consideration of the premises, and that the plaintiffs, at the request of the defendant, then, to wit, on the day and year last aforesaid, promised the defendant to perform and fulfil the said terms on their part, the defendant then promised the plaintiffs to perform and fulfil the said terms on his the defendant's part; and although the plaintiffs were always ready and willing to perform and fulfil the said terms in all things on their part, and although the said 9th day of December elapsed after the said promise of the defendant and before the commencement of this suit, of all which premises the defendant hath always had notice; yet the defendant, disregarding his said promise,

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did not nor would, before the said 9th day of December, pay, nor hath he since paid to any or either of the said bankers, or at any of their banks either in London or elsewhere, or to any other person to the account of the said company, the said deposit of 2*l.* 2*s.* per share, but hath wholly neglected so to do, by means of which said premises the plaintiffs have been and are greatly injured and damnified, &c.

Special demurrer, on numerous grounds; but those marked as the points for argument were, first, that the declaration is bad both in form and substance, and shews no sufficient cause of action: secondly, that the matters therein stated are not sufficient from which to imply the promise alleged: thirdly, that the only consideration stated for the promise declared on, is the allotment to the defendant of shares in a company which the plaintiffs and others, once upon a time, before the making of the promise, had agreed with each other to endeavour to form, but which said agreement, and the formation of the said company, and all endeavours to form the same may (consistently with the said declaration) have been given up and abandoned long before the said allotment or promise, and that such consideration is insufficient to sustain the said promise: fourthly, that the declaration is wanting in certainty, in not stating whether the formation of the company commenced before or after the coming into operation of the statute 7 & 8 Vict. c. 110: fifthly, that if the formation of the company commenced before the coming into operation of the 7 & 8 Vict. c. 110, all the several parties to the agreement for its formation, and not the plaintiffs alone, ought to have sued in this action, and if the formation commenced after the said act came into operation, then the declaration ought to have shewn that the plaintiffs were, according to the act, entitled to allot shares and receive deposits, and that the deposits sued for are such as the act authorises: sixthly, that the declaration ought to have shewn with certainty that the defendant accepted the allotment: seventhly, that the declaration ought to have stated with

certainly the terms which the plaintiffs are alleged to have promised to fulfil, and been ready and willing to fulfil.—Joinder in demurrer.

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Butt (*Maynard* with him) argued in support of the demurrer, in Trinity Term (June 7).—First, the declaration is bad, for want of an averment that the company was provisionally registered under the 7 & 8 Vict. c. 110. The 23rd section of that act enables any joint-stock company, on its provisional registration being certified in the manner prescribed, to do certain acts; and amongst others to allot shares. The 24th section prohibits under a penalty the promoters of a joint-stock company from issuing any note, scrip, or letter of allotment, before a certificate of provisional registration has been obtained. It ought, therefore, to have been shewn on the face of the declaration that the plaintiffs were entitled to allot shares, and sue for the deposits. [*Pollock*, C. B.—If the company are not in a situation to sue, that is a matter of defence, which should be pleaded.] The plaintiffs are bound to shew that the requisites of the statute have been complied with; unless they do so the proceedings appear to be illegal. [*Pollock*, C. B.—Then the defendant ought to have pleaded the illegality.] The registration of the company is a condition precedent to the plaintiffs' right to sue, and ought therefore to have been averred by them. Secondly, the declaration does not shew any circumstances from which the promise alleged can be implied by law. The contract is stated to have been made with the plaintiffs, but the facts disclosed shew that the contract (if any) was not made with the plaintiffs alone, but with them and other persons associated together in the joint undertaking. The case of *Woolmer v. Toby* (a) is in point. There the defendant was sued as an allottee of shares by the managing committee of a railway company, and the Court of Queen's Bench

(a) Q. B., T. T., 1847.

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made absolute a rule for a nonsuit, on the ground that the contract had been made by the defendant with the provisional committee. Here it is not alleged that the deposits were to be paid to the plaintiffs, but that they were to be paid into certain banks to the account of the company. The implied promise is, therefore, to pay the company, and not the plaintiffs alone. Thirdly, the consideration for the defendant's promise is stated to be an allotment of shares in a proposed railway company; but is consistent with every allegation in the declaration, that the project for establishing the company was abandoned before the allotment took place. Fourthly, the declaration does not contain any averment that the defendant accepted the allotment of shares. Fifthly, the declaration is defective, inasmuch as it alleges the implied promise of the defendant to be "in consideration of the premises, and that the plaintiffs at the request of the defendant promised the defendant to fulfil the said terms on their part;" but it is not stated with certainty what the terms are which the plaintiffs promised to fulfil.

J. Brown (Martin with him) in support of the declaration (Nov. 12).—There are two answers to the first objection: first, the provisions of the 7 & 8 Vict. c. 110, apply only to companies formed after the 1st of November, 1844. That is evident from the first and second sections of the act. All the dates in this declaration are laid under a *videlicet*; consequently, for aught that appears, the company may have been formed prior to the 1st of November, 1844. Secondly, illegality is not to be presumed; if it exists in fact, it ought to be pleaded. In *Daintree v. Hutchinson* (a), which was an action on a coursing match, it was held, that the objection that the match was illegal under the 16 Car. 2, c. 7, s. 2, could not be taken unless pleaded specially, even though the objection appeared on the plaintiffs' pleadings or case. [*Pollock*, C. B.—The

(a) 10 M. & W. 85.

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Apothecaries' Act (55 Geo. 3, c. 194) prohibits any person from practising as an apothecary, or recovering any charges, unless he has obtained a certificate of examination, or has been in practice prior to the 5th of August, 1815. But a party suing without a certificate is not obliged to aver that he was in practice before the 5th of August, 1815.] Although no person can act as a broker in the city of London unless he has obtained a license for that purpose, yet a broker who sues for commission need not in his declaration allege such license: *Cope v. Rowlands* (a). So in an action upon a contract to perform at a theatre, it need not be averred that the theatre was licensed: *Astley v. Weldon* (b). The 36 Geo. 3, c. 86, ss. 1, 3, requires that casks in which butter is sold shall be of a particular description and marked in a certain manner; but a person suing for the price of butter sold is not obliged to shew that he had complied with all the requisites of that statute. The true principle is stated in Bac. Abr., tit. "Statute," (L.) 3, where it is said, "If a statute made certain circumstances necessary to the validity of an act which was valid at the common law without such circumstances, this does not alter the manner of pleading which was used before the making of the statute. A tenant for years cannot, since the 29 Car. 2, s. 3, assign over his term without doing it in writing; but as he might have done this by parol at the common law, an assignment may be pleaded without alleging it to have been in writing; and it may be given in evidence that it was in writing." Also in Stephen on Pleading (c), it is said, "Where a thing is originally made by act of Parliament, and required to be in writing, it must be pleaded with all the circumstances required by the act; as in the case of a will of lands it must be alleged to have been made in writing; but where an act makes writing necessary to a matter where it was not so at the common law, as where

(a) 2 M. & W. 149.

(b) 2 Bos. & P. 346.

(c) P. 411, 5th ed.

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a lease for a longer term than three years is required to be in writing by the Statute of Frauds, it is not necessary to plead the thing to be in writing, though it must be proved to be so in evidence." At common law there was nothing illegal in a contract of this description (a). [He was then stopped by the Court on that point.]

With respect to the second objection, "the declaration alleges that the plaintiffs, at the request of the defendant, allotted to him thirty-five shares in the company upon certain terms then agreed upon by and between the plaintiffs and the defendant." If, therefore, as contended by the other side, the promise alleged is only one implied by law, it is, nevertheless, a promise resulting from an express agreement with the plaintiffs alone. *Woolmer v. Toby* is distinguishable, because that was a question of evidence, and not on a point of pleading. The case of *Jones v. Robinson* (b) is an authority to shew, that although the consideration for a contract moves from several, one of them may declare on the contract, and allege a promise to himself. [*Pollock, C. B.*—That was the case of an express promise, not one implied by law.]

As to the objections in point of form, it is said, first, that the only consideration for the promise was an allotment of shares in a company which certain persons had agreed together to endeavour to form; and that it is consistent with every allegation in the declaration that the proposed undertaking was abandoned before the shares were allotted to the defendant. But the Court will not presume that to be the case. It is a rule well established, and recognised in the recent case of *Price v. Price* (c), "that things are presumed to continue in the same state until the contrary appears." There is no weight in the second formal objection, that it does not appear with certainty that the defendant accepted

(a) See *Garrard v. Hardey*,
 5 Man. & G. 471.

(b) Post.

(c) 16 M. & W. 233.

the allotment of shares, because the declaration expressly avers that the allotment was made at the defendant's request. The last objection is, that, inasmuch as the declaration alleges the terms of the implied promise to be "in consideration of the premises, and that the plaintiffs, at the request of the defendant, promised the defendant to perform and fulfil the said terms on their part," it ought to have stated what the terms were. But the true consideration is "the premises," and the reference to terms to be performed by the plaintiffs may be rejected as surplusage—*utile per inutile non vitiatur*. The rule is thus stated in *Chitty on Pleading* (a): "When part of an entire consideration, or one of several considerations stated in a declaration, is merely frivolous and void, without being illegal, and the residue is good, and extends to the whole of the promise, the void part will not vitiate the declaration, but may be rejected as surplusage, and the promise will be referred to and supported by that part of the consideration which is legally sufficient."

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Maynard, in reply.—First, as to the point of illegality. It is conceded that where the declaration is general, and the consideration for the promise may, under one state of facts, be legal, but under another state of facts illegal, in such case the illegality must be pleaded. Thus, where the plaintiff declares for goods sold and delivered, and the defence is that the goods are articles prohibited to be sold by statute, as fireworks (b), or spirits in small quantities (c), such defence must be pleaded. But where a contract is declared on, which can only be legal under one state of facts, the declaration must aver all circumstances necessary to shew its legality. *Daintree v. Hutchinson* (d) cannot be supported to its full extent; for if the illegality appears on the face of the declaration, it is not necessary to plead it,

(a) Vol. 1, p. 301, 7th ed.

(c) 24 Geo. 2, c. 40, s. 2.

(b) 9 & 10 Will. 3, c. 7, s. 1.

(d) 10 M. & W. 86.

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all that is required being that the illegality should appear on some part of the record. In the case of an insurance on a ship, where, under the 19 Geo. 2, c. 37, it is necessary to the legality of the contract that the insurer should have an interest in the subject-matter, it is usual to aver such interest. In *Cousins v. Mantz* (a) it was held, that a policy in the common form was a policy on interest, and that the declaration must aver in whom the interest vested. *Craufurd v. Hunter* (b) is also in point. Contracts for the sale of stock not in possession are illegal under the Stock Jobbing Act, 7 Geo. 2, c. 8; and accordingly all the precedents contain an averment of possession in the party selling. The true principle is stated in Com. Dig., tit. "Pleader," (c. 76), where it is said, "The plaintiff in his declaration ought to aver every fact, without being informed of which the Court cannot judge whether the plaintiff has cause of action." "So, in all cases where any circumstances are required by the purview of an act to make it good, they ought to be averred; as where the statute, 1 R. 3, 1, makes a feoffment &c. by cestui que use of full age, sane, and at large &c. good, he who pleads a feoffment by cestui que use ought to aver that he was sane, of full age, and at large."

Then as to the right of the plaintiffs to sue. The consideration moves from the whole body of persons associated together in the common undertaking, and the action is improperly brought by the plaintiffs alone; in truth, *Woolmer v. Toby* governs this case. [*Pollock*, C. B.—That case turned entirely upon the evidence, and the question there decided does not arise here.] The ground of that decision applies, for the same facts are set out on the record which there appeared from the evidence. [*Pollock*, C. B.—Here it is averred that the contract was made with the plaintiffs, who were the committee of management. *Alderson*, B.—In *Woolmer v. Toby* the Court came to the conclusion

(a) 3 Taunt. 513.

(b) 8 T. R. 13.

that the promise was not *in fact* made to the plaintiffs; if this case be similar to that, and the defendant chose to deny the promise, he would succeed.] The promise points to the entire body from whom the consideration moves. It is evident that the interest in the contract vests in them, for the deposits are to be paid to their account. *Bowen v. Morris* (a) is an authority in support of the position contended for.

With respect to the formal objections: the declaration ought to aver every fact necessary to constitute a liability in the defendant to pay some deposit. But it only shews an allotment of shares in a company which a certain number of persons at some previous time had agreed to form. There is no averment that the company is continuing; indeed, it is consistent with every allegation, that at the time the shares were allotted, the company no longer subsisted, or it may be that a change in the members of the company took place between the time of the application for shares and the time of their allotment; or that the company was not formed until long after the shares were allotted. Lastly, the consideration for the promise is insufficiently stated; although it appears that some terms were to be performed on the part of the plaintiffs, it does not appear what those terms were. The rules of pleading require the whole consideration for the contract to be set out: *Beech v. White* (b). In *Tigis v. Cutter* (c), which was recognised in *McNeill v. Reid* (d), Lord Tenterden ruled that an action cannot be maintained for the breach of an agreement to become a partner, without proof of the specific terms of the intended partnership. [*Pollock*, C. B.—That case only decides, that, if you bring an action on an agreement, you must shew what the terms are. So here, if the defendant had pleaded non assumpsit, the plaintiffs must have

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(a) 2 Taunt. 374.

(b) 12 A. & E. 668.

(c) 3 Stark. N. P. 139.

(d) 9 Bing. 70.

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shewn the terms of the contract.] If the consideration is "the premises" alleged, they are insufficient to raise the promise, whether express or implied: *Roscorla v. Thomas* (a).

POLLOCK, C. B.—I am of opinion that our judgment ought to be for the plaintiffs. Two objections are made to this declaration in matters of substance, and there are also some objections in point of form. The objections of substance are, first, that it does not appear that this company has been registered as required by law. It is said, and no doubt truly, that, by the 7 & 8 Vict. c. 110, a company of this nature *now* formed cannot allot shares until it is provisionally registered; but the answer to that objection is, that the statute applies only to companies formed after the 1st of November, 1844; and so far as any thing appears, this company may have been formed before that time. This objection, if it really existed, should have been made by plea; viz. that the company was formed after the passing of that statute, and was not registered in the manner required. It is said, however, that the plaintiffs ought to have shewn when the company was formed, in order that it might appear that they were acting legally; but I think the authorities cited by Mr. *Brown* prove that this objection is not well founded, and our constant experience is, that a party suing is not bound to anticipate matters of that kind, and that they should come from the other side.

The second objection is, that the plaintiffs are partners with others who ought to have sued jointly with them. But there is a contract shewn between the plaintiffs and defendant, for there is a consideration shewn in respect of which the plaintiffs have a sufficient interest to sue the defendant. It may turn out otherwise when the facts come to be examined; but, on the face of this declaration, there is a

consideration sufficient to support the promise, if the promise was actually made by the defendant to the plaintiffs.

With respect to the objections in point of form, they ought not to prevail. The principal point on which Mr. *Maynard's* argument proceeded was, that there is a statement in the declaration that certain terms were to be performed by the plaintiffs, and those terms are not set out; but when the declaration comes to be examined, it will appear that this objection is not well founded. I forbear to give any opinion as to what would be the effect of a declaration which referred to certain terms as part of the contract, and as forming also part of the consideration. Whether such a declaration would be open to a special demurrer, it is not necessary to decide. Some doubt might be entertained whether such a case would not come within the rule which has been long established, and was recognised in the case of *Cryps v. Baynton* (a), which was an action against the defendant for necessities supplied to a third party, at his request, and the declaration, which averred generally that necessities were supplied, was objected to, for not shewing what those necessities were: the Court, however, held it good, and that the general allegation was sufficient, in order to avoid multiplicities in pleading, unless the items of account became important in that particular suit. But that point does not arise here; for the question is, whether any terms are stated, and if so, whether they are fully stated, and whether the allegation which relates to them can be objected to on special demurrer. Now, the allegation is this, that shares were allotted to the defendant on certain terms then agreed upon between the plaintiffs and the defendant, (that is to say), "that a deposit of 2*l.* 2*s.* upon each and every of the said shares so allotted to him should be paid by the defendant on or before the 9th of December, 1845, to the account of the said company, to one of certain

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bankers, then appointed and agreed upon in that behalf, to wit," &c.; and it adds, "of all which premises the defendant had notice; and thereupon, in consideration of the premises, and that the plaintiffs, at the request of the defendant, then, to wit, on &c., promised the defendant to perform and fulfil the said terms on their part, the defendant then promised the plaintiffs to perform and fulfil the said terms on his the defendant's part." Mr. *Maynard* says, there may be more terms, but I think that such an objection cannot be taken advantage of on special demurrer. The defendant should have pleaded non assumpsit, and if it appeared at the trial that there were other terms in the contract, there would be a variance between the declaration and proof. If those terms required anything expressly to be done, the plaintiffs, no doubt, were bound to do it; if, under any circumstances, they would have raised by implication anything to be done, the plaintiffs were bound to do what they promised; but if the terms raised nothing to be done, either expressly or by implication, any reference to them would be surplusage. The plaintiffs were not bound to ascertain the extent of their obligation, either express or implied. They do promise to do all that on their part was to be done. In my opinion, there was an implied promise to some extent; for instance, to continue their account at the bankers', or, if they changed their bankers, to give the defendant notice of it. If there was any implied promise, we cannot treat that allegation as surplusage, for implied terms are as good as those expressed. I think that none of the objections, either of substance or form, are well founded.

ALDERSON, B.—I am of the same opinion. As to the question of illegality, it ought not to be implied; but on the face of the declaration we must presume the transaction to be legal. It may be that the company is illegal, if not provisionally registered; but we do not know that it has

not been so registered. It may be legal, even though not registered, if it was constituted before the 1st of November, 1844; if that be not so, the defendant should have shewn it by plea, which he has not done. Then, as to the case of *Woolmer v. Toby*, the answer has been already given in the course of the argument, namely, that in *Woolmer v. Toby* the proof did not agree with the statement in the declaration; the declaration stated the contract to have been with A., B., & C., while the proof was that it was with D., E., & F. The statement here is, that the defendant's promise was made with certain persons, being the managing committee: very probably, if the plaintiffs were put to prove that fact, they could not do it, and it might turn out, as it did in *Woolmer v. Toby*, that the contract sued on was made with other persons than the plaintiffs. It is sufficient for us to say, that the contract stated in this declaration is a contract with the plaintiffs, and if in issue must be so proved.

The two other objections also fail. If the language of the declaration had been "in consideration of the premises, and of the plaintiffs undertaking to perform what was to be performed on their part, the defendant undertook and promised on his part," I should have taken time to consider whether the omission to specify the terms to be performed on the part of the plaintiffs would not have been a good objection on special demurrer; but here the promise is stated to be "in consideration of the premises, and that the plaintiffs, at the request of the defendant, promised the defendant to perform and fulfil the said terms on their part." The word "said" refers to the previous statements in the declaration; and if those previous statements in the declaration are sufficient, as they clearly are, to shew certain express or implied terms for this promise, those terms are virtually stated in the allegation of the promise by the reference which it makes to those statements; therefore the special demurrer fails, because it seeks to object to the declaration as containing

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an insufficient statement of the terms, when it is clear that they are sufficiently stated.

ROLFE, B.—I am of the same opinion. With respect to the objection that the contract in this declaration should have been treated as a contract with all the members of the company, and not as a contract with the managing committee, it may be in fact a contract with the company; but there is nothing in point of law to render it improper to make a contract with persons forming a committee of management, to enure to the benefit of the company. It does not appear that the committee of management were part of the company, but only that the plaintiffs had agreed with other persons to form a company, of which they were to be part, and were to allot shares in it. It then states, that, in pursuance of that agreement, the plaintiffs allotted shares to the defendant, and that they performed all they had undertaken to perform, and that he had not performed what he had undertaken to perform. If the facts be as stated, I think that there was such a contract with the plaintiffs as will enable them to maintain the action. Then it is said that this does not appear to be a legal contract, by reason of the stat. 7 & 8 Vict. c. 110. But it is a good contract at common law, and illegal only if made after the passing of a particular act of Parliament, and if certain requisitions are not complied with. We cannot presume those facts, and if they exist they ought to come from the other side. The only point about which I entertained any doubt was this, that it appeared by the declaration that certain terms were to be performed by the plaintiffs, and it was not shewn what those terms were. But the truth is, the declaration shews that there were no terms except those already averred in it, and therefore the words implying those terms are surplusage. The case resembles that of *King v. Rarburgh* (a), where the declaration stated the defendant to be

indebted for work and labour, &c., and also for diseases and other necessary things &c. provided; and *Bayley*, B., said, that the allegation of the defendant being indebted for diseases was mere surplusage, and might be rejected; and that if the count was good as to any one of the considerations alleged, the promise would be supported: so here, I think that there is a sufficient consideration to support the promise, the plaintiffs having done all that they contracted to perform.

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Judgment for the plaintiffs.

ESDAILE (Public Officer) &c. v. TRUSTWELL.

Nov. 17.

DECLARATION in scire facias upon a judgment recovered by the plaintiff as registered public officer of the London and Westminster Bank" against the registered public officer of the "Leeds and West Riding Banking Company." The declaration, after reciting in the usual form the recovery of the judgment against the public officer, and that, under the provisions of the statute, execution might issue against any member or members for the time being of such copartnership, proceeded thus: "And whereas R. Trustwell, at the time of such judgment being recovered as aforesaid, was, and from thence hitherto hath been, and still is a member of the said copartnership," &c.

Semble, that a declaration in scire facias on a judgment recovered against the public officer of a banking co-partnership, alleging that the defendant, at the time of judgment recovered, was and from thence hitherto had been and still is a member of the copartnership, is bad on special demurrer.

Special demurrer, assigning for causes, that the declaration shews that the defendant was a member of the said "Leeds and West Riding Banking Company" at the time of the recovery of the said judgment, and also at the time of the issuing and suing out of the said writ in the declaration mentioned; and that the declaration is on that account double, or at all events, uncertain.—Joinder in demurrer.

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Jones, in support of the demurrer.—First, the declaration is obviously double. The 13th section (a) of the 7 Geo. 4, c. 46, “for the better regulating copartnerships of certain bankers in England,” enacts that execution (that is, a *scire facias*) on any judgment obtained against the public officer, may be issued against any member or members for the time being of such copartnership, which means at the time the *scire facias* issues. The section goes on to provide, that, in case that execution shall prove ineffectual for obtaining payment of the amount of the judgment, execution may issue against any person who was a member of the copartnership at the time of the judgment obtained. The effect of the section is, that proceedings to execution must be taken in the first instance against the persons who are shareholders at the time the *scire facias* issues. That being so, it is evident this declaration is double, for it

(a) Enacts, “that execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership, carrying on the business of banking under the provisions of this Act, whether as plaintiff or defendant, may be issued against any member or members for the time being of any such corporation or copartnership; and that in case any such execution against any member or members for the time being of any such corporation or copartnership, shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member

or members of such corporation or copartnership at the time when the contract or contracts, or engagement or engagements, in which such judgment may have been obtained was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: Provided always, that no such execution as last-mentioned shall be issued without leave first granted, on motion in open court, by the Court in which such judgment shall have been obtained, and which motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership.”

charges the defendant with two liabilities, and the plaintiff would be entitled to recover, upon proving either that the defendant was a shareholder when the writ of scire facias issued, or at the time when the judgment was recovered. The declaration would have been perfectly good, if it had merely stated that the defendant was a member at the one or other of those times. It will, perhaps, be said that the declaration is not double, because it discloses only one cause of action; but that is not a sound test, for though the plaintiff exhibits but one cause of action, he seeks to sustain it by different liabilities. The rule against duplicity is, "that a declaration must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported." Stephen on Pleading, 3rd ed., 285. Secondly, the declaration is, at all events, objectionable for uncertainty. How is the defendant sought to be charged? whether as a shareholder at the time the scire facias issued, or at the time of judgment obtained? It is impossible to say upon which liability the plaintiff relies. [*Parke, B.*—There was an application before me at chambers to quash a scire facias in this form.] [*Willes, amicus curiæ*, stated that he was counsel in the case alluded to, and that *Parke, B.*, quashed the writ because it gave a chance of succeeding in two events.] That is, in truth, the objection in this case. The declaration clothes the defendant with two characters; in neither of which is he liable, and leaves it uncertain in which he is sought to be charged. [*Alderson, B.*—Suppose the defendant was not a member at the time the writ issued, but only at the time the judgment was obtained; how could he make a valid plea to this declaration? His defence might be a sufficient answer so far as the declaration charged him with being a member at the time the judgment was obtained, but not to that part of it which charges him as a member for the time being.] In like manner, a defence which he might have if charged as a member for the time being would be no answer to the

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action, so far as it charged him as a member at the time of judgment. [*Alderson, B.*—If this declaration be good, the next step will be to allege that the defendant was a member at the time of the contract, at the time of the judgment, and at the time of the execution.]

Bovill, contra.—The declaration shews but one distinct liability, by reason of the defendant being a member of the copartnership at the time the writ issued. Any allegation beyond that may be treated as surplusage. There must be an ineffectual execution, before proceedings are taken against a member at the time of judgment recovered. The prior execution must therefore appear on the face of the declaration. If in this case the defendant were to plead that he was not a member at the time of the judgment, or at the time the scire facias issued, and it should turn out at the trial that he was a member at the former period, but not at the latter, the declaration would appear to be bad, for not shewing on the face of it a prior execution. It is evident, therefore, that the only substantial and material allegation is, that the defendant was a member at the time the writ issued. [*Parke, B.*—Could a person sued as shareholder at the time of judgment recovered, traverse the allegation that effectual means were taken to recover against the persons who were shareholders at the time the scire facias issued?] It is submitted that he might. [*Parke, B.*—It would seem that the legislature intended that question to be decided by the Court, and not by a jury.] The plaintiff ought to allege on the writ every fact necessary to shew his right to issue the execution.

PARKE, B.—You had better amend, by striking out the allegation that the defendant was a member at the time of judgment recovered. The question depends upon whether the previous steps are a condition precedent to be decided by a jury, or whether the Court are not to decide whether

a second writ ought to issue. I do not mean to say that you are wrong, but it is a case in which you had better amend. There is no reason why you should not amend the writ as well as the declaration. The objection to amend writs of summons arises from the resolution of the judges upon the peculiar enactment of the Uniformity of Process Act, and does not apply to a scire facias.

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Amendment accordingly.

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Nov. 25.

TRESPASS. The first count was for breaking and entering three closes of the plaintiff, called Five-acres, Six-acres, and Northovers. The second count was for breaking and entering another close of the plaintiff's.

The defendant pleaded, 1st, not guilty to the whole declaration; 2ndly, as to the first count, a denial that the closes in that count mentioned were the plaintiff's; 3rdly, to the first count, a justification under a public right of footway over the three closes in that count; 4thly, to the first count, a justification under a private right of footway over the same three closes, by prescription; 5thly, to the first count, a justification under a similar right, by twenty years' user, under 2 & 3 Will. 4, c. 71; 6thly, to the first count, a justification under a similar right by forty years' user.

The plaintiff replied by joining issue on the first and

To a count of trespass qu. cl. fr. upon three closes—the defendant pleaded several pleas; the plaintiff new assigned trespasses extra viam as to the third close, to which the defendant pleaded not guilty. The defendant had a verdict upon some of the issues with respect to the first and second closes, and the plaintiff upon others, so that the defendant succeeded as to the causes of

action in those closes—the plaintiff had a verdict, with one farthing damages upon the new assignment. There was no certificate under 3 & 4 Vict. c. 24:—*Held*, that the causes of action in that count were divisible; and that, under the 4 & 5 Ann. c. 16, ss. 4, 5, the plaintiff was entitled to the costs of the issues found for him, with respect to the causes of action in the first and second closes; but that he was deprived of all costs by 3 & 4 Vict. c. 24, with respect to the cause of action for trespasses in the third close. By the one statute the defendant is punished for pleading pleas which he cannot support; and by the other, the plaintiff is punished for bringing a frivolous action, in which he succeeds.

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second pleas. As to so much of the third plea as related to the trespasses committed in Five-acres and Six-acres, the plaintiff traversed the right of way modo et formâ, upon which issue was joined. As to so much of the third plea as related to the trespasses committed over Northovers, the plaintiff new assigned trespasses extra viam, to which the defendant pleaded not guilty, upon which issue was joined. The fourth, fifth, and sixth pleas were traversed by the plaintiff, and issue was joined upon them. At the trial, before *Williams, J.*, at the last assizes for Somersetshire, the jury found a verdict for the plaintiff on the first count on the plea of not guilty, and for the defendant on the second count; on the issue to the second plea, for the plaintiff; as to so much of the third plea as related to Five-acres and Six-acres, for the defendant; as to the new assignment in respect of Northovers, for the plaintiff, with a farthing damages; and the issues on the fourth, fifth, and sixth pleas for the plaintiff. There was no certificate obtained under 3 & 4 Vict. c. 24. The Master on taxation refused to allow the plaintiff any costs. A rule having been obtained to review the taxation,

Taprell shewed cause (Nov. 22). — The Master was right in not allowing the plaintiff any costs. The question turns upon the construction to be put upon Lord *Denman's* Act, 3 & 4 Vict. c. 24, which was passed with the same object as the 43rd Eliz. c. 6, namely, to exclude frivolous actions from the superior courts of law. Under the former statute of Eliz., it was held that where the judge certified to deprive the plaintiff of costs, the damages being under forty shillings, the plaintiff was not entitled to the costs of the pleas found for him, notwithstanding the statute of 4 Ann. c. 16, s. 45; *Hovard v. Cheshire* (a), *Richmond v. Johnson* (b). The authority of these cases was recognised by

(a) *Sayer*, 260.

(b) 7 *East*, 583.

Patteson, J., in *Robinson v. Messenger* (a), where he says, "In *Richmond v. Johnson* it was held that the statute 4 Ann. c. 16, s. 5, did not destroy the effect of the judge's certificate under the statute 43 Eliz. c. 6, s. 2, though there were several pleas." Under 22 & 23 Car. 2, c. 9, where the damages were under forty shillings, and there was no certificate of the judge, the plaintiff was not entitled to any more costs than damages, notwithstanding the statute of Anne. It is admitted that where the defendant pleads several pleas, each of which goes to the whole cause of action, and the issue on any one is found for him, as he is entitled to the *postea* and general costs, the plaintiff is entitled to the costs of those issues which are found for him under the statute of Anne; but here the plaintiff has obtained a verdict upon the new assignment. The plaintiff is substantially in the same situation as if he had established a good cause of action upon not guilty pleaded to the declaration. Lord *Denman's* Act was not intended to make any difference in the practice with respect to the costs of double pleadings. It was intended to apply to the case where a verdict is found in a suit in which there are a variety of issues. In *Marriott v. Stanley* (b), *Maule, J.*, says, "A suit in which less than forty shillings is properly recovered is frivolous within the intention of the statute, but those are exceptions to it which are, in fact, brought to try, not merely the right to recover damages, but to try a right beyond that, or to vindicate the plaintiff from the vexation of a wilful and malicious injury. All others are frivolous and vexatious, and the plaintiff should be deprived of his costs." *Newton v. Rowe* (c) is an authority in the defendant's favour. That was an action of libel, to which the defendant pleaded not guilty and several other pleas; the plaintiff recovered a verdict upon all the issues, with three farthings

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(a) 8 Ad. & Ell. 609. (b) 9 Dowl. P. C. 61. (c) 1 C. B. 187.

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damages, and it was held that, under Lord *Denman's* Act, he was not entitled to any costs. [*Parke, B.*—All the issues were found for the plaintiff in that case.] If the plaintiff is not entitled to any costs where he has succeeded in establishing his whole cause of action, how should he be in a better condition where he has failed as to part? Lord *Denman's* Act does not contemplate the division of the action, neither did the acts of Eliz. & Car. 2. The intention of the statute is, that, where the action results in a verdict for less than forty shillings, the plaintiff shall incur the penalty of losing all his costs. Statutes which deprive a plaintiff of costs with the view of discountenancing frivolous suits should be liberally construed, in order to advance that object; *Irvine v. Reddish* (a). The 7th rule, Hilary Term, 4 Will. 4, does not affect the present question: *Simpson v. Hurdiss* (b), *Robinson v. Messenger* (c), *Fry v. Moncton* (d).

Montague Smith, in support of the rule.—In the present case there are three distinct causes of action, for trespasses committed in three closes. As to two of these the plaintiff has failed, but he has succeeded as to the third on the new assignment. With regard to the new assignment it is admitted that he is not entitled to any costs, but it is contended that he is entitled to the costs of the issues which were found for him in respect of the causes of action on which he has failed. The case of *Newton v. Rowe* (e) is distinguishable from the present; there all the issues were found for the plaintiff, here some are found for the defendant. The words of Lord *Denman's* Act are, that if the plaintiff “shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to re-

(a) 5 B. & Ald. 796.

(b) 2 M. & W. 84.

(c) 8 Ad. & Ell. 609.

(d) 9 Dowl. P. C. 967.

(e) 1 C. B. 187.

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cover or obtain from the defendant in respect of such verdict any costs whatever." The words "in respect of such verdict" override the whole clause. The plaintiff does not ask for costs in respect of the verdict, but he contends that he is entitled to them by the statute of Anne. Here are three distinct and divisible causes of action; that was not so in *Newton v. Rowe* (a). In *Howard v. Cheshire* (b) all the issues were found for the plaintiff. Where the defendant obtains the verdict, and the plaintiff succeeds upon some of the issues, the plaintiff is entitled to the costs of the issues so found for him: *Spencer v. Hamerton* (c). It cannot be said that the causes of action upon which the plaintiff has failed are frivolous. The cases already decided do not interfere with the present: the question here is new.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case the plaintiff brought an action for several trespasses in three different closes, Six-acres, Five-acres, and Northovers, in one count; in the second count in another close. Not guilty was pleaded to all; 2ndly, not the plaintiff's closes; 3rdly, a public way over the three closes in the first count; 4thly, 5thly, and 6thly, a private way over the three closes by prescription, twenty years' user, and forty years' user. These four latter pleas were to the first count alone. The replications took issue on the first and second pleas, and traversed all the pleas except that of public way, so far as related to Northovers, as to which the plaintiff newly assigned trespasses extra viam, which was denied by the rejoinder. On not guilty, the verdict was for the plaintiff on the first count; for the defendant on the second; on the second plea, for the plain-

(a) 1 C. B. 187. (b) Sayer, 260. (c) 4 Ad. & Ell. 413.

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tiff; on the third, as to Six-acres and Five-acres, for the defendant; on the new assignment for the plaintiff, with one farthing damages. And the issues on the fourth, fifth, and sixth pleas were found for the plaintiff. The Master refused to tax the plaintiff any costs, and a rule was obtained to review the taxation.

On this record it appears that the plaintiff has altogether failed, and the defendant has succeeded, with respect to the cause of action in two closes, but that he has pleaded as to that cause of action four several unnecessary pleas, on which the plaintiff has had a verdict. With respect to the cause of action for trespasses in the third close, he has brought an action in respect of which he has obtained only one farthing damages, and so far therefore as relates to that cause of action, the effect of Lord *Denman's* Act is to deprive the plaintiff of all costs. This result is a punishment for having brought a frivolous action for that cause, and there is no doubt that if the plaintiff had sued for that cause of action alone, and there had been special pleadings all found for him, he would have lost all the costs of all the issues, as was properly decided in the case of *Newton v. Rowe* (a). In such a case the statute of 4 Ann. c. 16, does not apply, for no one plea as to the cause of action was found for the defendant. In such case it may be that there is an inconvenience (as suggested in this case), as contrasted with the case of a verdict for the defendant upon the plea of not guilty, and for the plaintiff on the justifications. But in the case where the defendant so succeeds, the matter in dispute may have really been of serious amount to the plaintiff; whereas, when the plaintiff succeeds, it is by the verdict of the jury ascertained to be so frivolous that the legislature has thought no action at all should have been brought in respect of it. "Other hardships," as my

(a) 1 C. B. 187.

brother *Maule* in *Newton v. Rowe* properly observes, "might possibly be suggested, but no doubt the legislature has thought that all these are outweighed by the advantages to result from the discouragement of petty litigation." We concur entirely in that decision, and if there had here been a set of special pleas to the new assignment, all found for the plaintiff, the plaintiff could still have had no costs whatever in respect thereof.

But here there is a divisible cause of action in respect of the trespass in two of the three closes in the first count. We have held such a cause of action to be divisible in ejectment; *Doe d. Bowman v. Lewis* (a); as it had been previously held to be divisible in other cases, as in *Cox v. Thomason* (b), and other authorities on this point. The plaintiff, therefore, with respect to those causes of action, is not in the position of a person bringing a frivolous action, but in that of a person who has brought an action, it may be for a real grievance, but in which he has failed. If this action had been brought for that cause alone, it is clear that, under the statute of 4 Ann. c. 16, the plaintiff would have been entitled to the costs of those issues found for him, there being also issues found for the defendant, giving the general costs of the cause to him. For that statute applies to cases where *one or more issues* are found for the defendant: *Richmond v. Johnson* (c).

Being of opinion that the causes of action are divisible, we think that this case is to be treated as if it were a separate action for the trespasses in two closes, and consequently the plaintiff is entitled to have the costs of the issues found for him, as to those closes, taxed; but he is entitled to no costs in respect of the third close. The consequence is, that the plaintiff is in a better condition by bringing an action in which he fails altogether, than by bringing a frivolous

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(a) 13 M. & W. 249.

(b) 2 C. & J. 498.

(c) 7 East, 583.

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one in which he succeeds: but this, we think, is the true result of Lord *Denman's* Act, combined with the cases establishing the proper construction of the statute of Anne.

It is, however, to be observed, that the defendant, when he succeeds, is punished by the one statute for improperly pleading pleas which he cannot support; and the plaintiff, when he succeeds, is punished by the other statute for bringing a frivolous suit.

Rule absolute.

Nov. 12.

GROUT v. ENTHOVEN, JAMES, and Others.

E., one of several persons sued as acceptors of a bill of exchange, pleaded that, at the time of the acceptance, the defendants were partners upon the terms (amongst others), that neither of the partners should, without the consent of the others, draw, indorse, accept, or negotiate any bill of exchange in the name of the firm otherwise than for bonâ fide debts or

ASSUMPSIT by drawer against acceptors of a bill of exchange. Plea by the defendant Enthoven, that, long before and at the time of the acceptance of the said bill, the defendants were in partnership together in trade, under the firm and style of Ricketts, James, & Co., upon the terms (amongst others) that neither of the said partners should, without the consent of the others, draw, indorse, accept, or negotiate any bill of exchange or promissory note in the name of the said firm, so as to render the said firm liable thereon, otherwise than for or in respect of bonâ fide debts or liabilities of the said firm. Averment, that the said bill was drawn upon and accepted by the said other defendants in the name of the said firm without the knowledge or consent of the defendant Enthoven, and in fraud of him, and

liabilities of the firm; that the bill was accepted by the other defendants in the name of the firm without the knowledge or consent of defendant E., and in fraud of him, and in violation of the terms of the partnership, and was delivered by the other defendants to the plaintiff for and on account of money due and owing to the plaintiff from the defendant J., and not for any debt or liability of the firm; of all which the plaintiff had notice at the time of the delivery of the bill to him; that there never was any value or consideration, except as aforesaid, for the acceptance of the bill, or for the payment thereof, by the defendant E.; and that the plaintiff has always held the same without value or consideration. Verification:—*Held*, on special demurrer, that the plea was an argumentative denial of the acceptance, and therefore bad.

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in violation of the said terms of partnership, and was delivered by the said other defendants to the plaintiff for and on account of money due and owing to the plaintiff from the defendant James, and other persons to the defendant Enthoven unknown, and not for or on account or in respect of any bonâ fide debt or liability of the said firm, of all which the plaintiff had notice at the time of the delivery of the said bill to him as aforesaid, and that there never was any value or consideration except as aforesaid for the acceptance of the said bill, or for the payment thereof by the defendant Enthoven, or for his liability to pay the amount of the said bill, or any part thereof, and the plaintiff hath always hitherto held and now holds the same, without such value or consideration. Verification.

Special demurrer, assigning for cause, that the plea amounts to a denial of having accepted the bill of exchange as in the declaration alleged, and is an informal and argumentative traverse of that allegation, and amounts to the general issue. Joinder in demurrer.

Butt, in support of the demurrer.—The plea is bad upon special demurrer, on the authority of *Jones v. Corbett* (a). That was an action against two defendants as acceptors of a bill of exchange, to which A. pleaded, that, before and at the time &c., defendants were partners, and as such had accepted bills in the partnership name; that B. accepted the bill in question, using the said name, in fraud of A., for his own private purposes, and not those of the partnership, and without the authority of A., and that A. never had any consideration or value for the acceptance, and never adopted it; of all which premises the plaintiff, at the time of the drawing and accepting, had notice. That was held, on special demurrer, a bad plea, as amounting to an argumentative denial of the acceptance. *Patteson*, J., there said, "There

(a) 2 Q. B. 828.

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is not in this plea any confession of an acceptance in fact; if there had been, it would have been proper to plead specially anything that gave it the character of illegality. But, when it is said that the person who appears as acceptor was not an authorised agent for the purpose, that is in effect a denial of the acceptance." The present plea is similar to that, and therefore bad on the same ground.

Meymott, contra, admitted that he could not distinguish the present case from *Jones v. Corbett*. [*Rolfe*, B.—The meaning of the plea is, that the other defendants had no authority as agents of the defendant *Enthoven* to accept the bill. *Alderson*, B.—The plea is an argumentative denial of the acceptance.]

PER CURIAM (a).—There must be

Judgment for the plaintiff.

(a) *Pollock*, C. B., *Alderson*, B., and *Rolfe*, B.

Nov. 12.

SPINDLER and JESSIE his Wife v. GRELLETT.

A declaration stated, that the defendant made his promissory note, and thereby promised to pay to the plaintiff, "by the name and addition of Miss Jessie Hope, at 10, Duncan Street, Edinburgh," the sum of £200, &c. Averment, that the plaintiff was always ready and willing to receive the said sum, according to the tenor and effect of the note, of which the defendant had notice. Breach, non-payment:—*Held*, on general demurrer, that this was a note payable at a particular place, and that the declaration was bad for want of an averment of presentment at that place.

DEBT.—The declaration stated, that the defendant, on the 25th of August, A. D. 1840, whilst the plaintiff Jessie was sole and unmarried, made his promissory note in writing, and then delivered the same unto the said Jessie, and thereby promised to pay to her, by name and addition of Miss Jessie Hope, at 10, Duncan-street, Edinburgh, the

sum of £200, &c. Averment, that the plaintiff was always ready and willing to receive the said sum, according to the tenor and effect of the note, of which the defendant had notice. Breach, non-payment:—*Held*, on general demurrer, that this was a note payable at a particular place, and that the declaration was bad for want of an averment of presentment at that place.

sum of £200, by instalments of £15 per quarter, to commence on the 1st of December then next, and so on until the said sum of £200 should be paid. Averment, that whilst the said Jessie was sole and unmarried, divers, to wit, seven of the said instalments had become due and payable, and that the said Jessie, whilst she was sole and unmarried, was always ready to receive the said last-mentioned instalments according to the tenor and effect of the said note, and that since the marriage of the plaintiffs (which took place on the 10th of October, A. D. 1842,) and before the commencement of this suit, the residue of the said instalments and of the said sum of £200 in the said note specified, had become due and payable; and that the plaintiffs since that time have always been ready to receive the said residue of the said sum of £200 according to the tenor and effect of the said note, of which said several premises the defendant, before the commencement of this suit, had notice. Breach, non-payment.

General demurrer, and joinder therein.

One of the points for argument was, that although the said promissory note is shewn to have been drawn payable at a particular place, it is not alleged to have been presented there for payment.

Addison, in support of the demurrer.—The declaration is bad, for want of an averment that the note was presented for payment at 10, Duncan-street, Edinburgh. Before the statute 1 & 2 Geo. 4, c. 78, there could be no doubt that where a bill or note was, in the body of it, made payable at a particular place, a presentment at such place must have been averred and proved; *Rowe v. Young* (a), *Sanderson v. Bowes* (b). That statute applies to bills only, and the law with respect to promissory notes remains unaltered: *Emblin v. Dartnell* (c). [*Alderson*, B.—The other side will

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(a) 2 B. & B. 165. (b) 14 East, 500. (c) 12 M. & W. 830.

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contend that the words "at 10, Duncan-street," are nothing more than part of the description of the payee.] If so, the words would have been "of 10, Duncan-street," and not "at." It is a principle of law that pleadings are to be taken most strongly against the party pleading them: *Pearce v. Champneys* (a). It will perhaps be urged, that where an ambiguity exists, such construction is to be adopted as will give effect to the document declared on; but that rule must be received with some qualification. In *Rex v. Stevens* (b), which was an indictment on the 33 Geo. 3, c. 52, s. 62, charging a British subject residing in India with receiving presents "for a long time, to wit, *until*" a certain day, the question was whether the word "until" was to be construed exclusive or inclusive of the day to which it applied, and the Court held that it might be construed in either way, according to the context and subject-matter. Lord *Ellenborough*, in delivering judgment, said (c): "If the word 'until' had occurred in a contract, and the context or subject-matter evidently shewed that it was meant in an inclusive sense, there can be no doubt but that the Court, in furtherance of such intention, would so construe it." In *Fleetwood v. Curley* (d), it was agreed that words of an ambiguous sense shall receive the best sense. The obvious meaning and best sense of these words is, that the note is payable at a particular place.

Needham, contra.—According to a reasonable construction of this instrument, it is not a note payable at a particular place. If the words "at 10, Duncan-street, Edinburgh," had been inserted after the words "to pay her," the effect would have been to render the note payable at that place only; but following, as they do, the name of the payee, they are merely words of description or addition. Clans in Scot-

(a) 3 Dowl. P. C. 276.
 (b) 5 East, 244.

(c) P. 256.
 (d) Hob. 267.

land are better known by place than name. The rule, that pleadings are to be taken most strongly against the party pleading them, is only applicable to cases of ambiguity in the words themselves. Here the word "at" evidently means "residing at." [*Alderson, B.*—If the word "at" means "of," why not so state it in the declaration? That would be describing the instrument according to its legal effect.] There is no ambiguity in the words, and even admitting that they are capable of two constructions, the objection simply resolves itself into one of a want of certainty, which can only be taken advantage of on special demurrer. On general demurrer the Court will make every intendment in favour of the declaration. The present case is not governed by the decisions cited, for the law as to payment of notes at a particular place (which it is conceded is not altered by the 1 & 2 Geo. 4, c. 78), applies only to negotiable securities, and not to an instrument like the present, which merely creates a debt between the parties to it. A covenant to pay at a particular place may be stated as a covenant to pay generally. As between payee and maker, no demand need be proved. *Wain v. Bailey* (a) decided, that when a note is not negotiable, the maker cannot refuse payment, though the payee be unable or refuse to produce it. The effect of that decision is, that, where a note is not negotiable, a presentment for or demand of payment is unnecessary. [*Pollock, C. B.*—All that *Wain v. Bailey* decides is, that, where the instrument is not negotiable, the maker is bound to pay it without its production, and therefore it is no answer to say that he was always ready and willing to pay on the note being delivered up.] It is the duty of the maker of a note to be ready to pay at all places, and the effect of a contract to pay at a particular place is to enable the maker to relieve himself, by shewing that he was then and there ready to pay. But that applies only to negoti-

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(a) 10 A. & E. 616.

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able instruments. [*Pollock*, C. B.—Why should the contract of the parties be altered, because the note is not negotiable? *Rolfe*, B.—It would be strange if the maker was ready to pay at the place mentioned in the note, and yet was liable to be sued because he was not somewhere else to pay it.] If presentment be necessary, it is in substance alleged in this declaration, for it is averred that the plaintiffs were always ready and willing to receive the amount according to the tenor and effect of the note of which the defendant had notice. *Huffam v. Ellis* (a) is an authority to shew that such allegation is sufficient on general demurrer. [*Pollock*, C. B.—Here there is no averment of demand.]

Addison, in reply.—The Court will not judicially notice the Scotch language or customs. The words “at 10, Duncan-street,” by a reasonable construction, mean that the note is to be payable at that particular place. In *Dovaston v. Payne* (b), *Buller*, J., says, “By a common intent I understand that where words are used which will bear a natural sense, and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail: it is simply a rule of construction, but not of addition. Common intent cannot add to a sentence words which are omitted. There is also another rule in pleading, which is, that, if the meaning of words be equivocal, they shall be taken most strongly against the party pleading them.” That rule was recognised by *Bayley*, J., in *Thornton v. Adams* (c). There is no foundation for the argument that a presentment is not necessary in the case of a note which is not negotiable.

POLLOCK, C. B.—I am of opinion that our judgment should be for the defendant. The form of the note must be taken to be that set out in the declaration. The question then is, what is the effect of a note by which the de-

(a) 3 Taunt. 415.

(b) 2 H. Blac. 531.

(c) 5 M. & Sel. 38.

fendant promised to pay one of the plaintiffs, when sole, by the name and addition of "Miss Jessie Hope, at 10, Duncan-street, Edinburgh?" Is it necessary, on account of the ambiguity and uncertainty of the language, to seek for the meaning of the parties out of the note itself, or is it not rather an inference of law, from the very form of the note, that it is payable at 10, Duncan-street? The statute 1 & 2 Geo. 4, c. 78, does not apply to promissory notes, which must still be presented for payment at the particular place (if any) at which they are made payable. Mr. *Needham* says, that there is a distinction between notes which are negotiable and those which are not. No doubt there is a distinction in one respect, as pointed out in *Wain v. Bailey*, viz. that the latter are available only in the hands of the party to whom they are made payable, whereas the former are payable to any bonâ fide holder. But that case fails to shew that there is any such distinction as that contended for, viz. that the place of payment is a matter wholly immaterial. If there had been any difference, I should have thought that where the contract is by the instrument confined to the parties themselves, the place of payment, being part of the contract, would be more likely to be important than in a case where the instrument went into the hands of other persons. It is said that the declaration does in substance state a presentment, because it alleges that the plaintiff was always ready and willing to receive the amount according to the tenor and effect of the note. But I think that averment does not supply the place of a demand of payment. The cases certainly shew, that if the declaration had alleged a demand according to the tenor and effect of the note, that would have been sufficient. In *Huffam v. Ellis* there was such an allegation, and though it was not specifically alleged that the demand was made at the place where the bill was payable, but only upon the persons at whose house it was payable, yet the demand being stated to be according to the tenor and effect of the bill, the Court

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held the allegation sufficient, as such demand could not be according to the tenor and effect of the bill unless made at the particular place. This is a case in which a note is made payable at a particular place, and the declaration contains no allegation of a presentment or demand. Our judgment must therefore be for the defendant.

ALDERSON, B.—I am of the same opinion. I think we must construe the declaration according to the English language, and we cannot so construe it without making the words “at 10, Duncan-street,” descriptive of the particular place at which the note is payable. If, as suggested, the plaintiff had substituted the word “of” for “at” in the declaration, there would have been no variance, supposing the words to mean only the description of the party. If, however, they really mean the place at which the note is payable, such a declaration would not be proved. I think they have the latter meaning, and as there is no averment of presentment or demand, the plaintiffs ought not to succeed.

ROLFE, B.—I am of the same opinion. The ground of demurrer is, that the note appears by the declaration to have been made payable at a particular place, and there is no averment of presentment at that place. First, it is said that such is not the true construction of the note, and that the words “at 10, Duncan-street,” are merely descriptive of the person of the payee. But it is impossible to torture the words to any such meaning, without endeavouring to make obscure that which is perfectly plain. Secondly, it is said, that it is not necessary to aver a presentment, because the note is not negotiable, and *Wain v. Bailey* is relied on. But in that case the party could not be damnified by the non-delivery of the note, for the instrument not being negotiable, the payee alone could sue upon it. No such distinction exists as to the necessity for presentment, which must be averred, whether the note be negotiable or not.

The third point is, that, assuming this to be a note payable at a particular place, the declaration alleges that which amounts to an averment of presentment, namely, that the party was always ready and willing to receive the money according to the tenor and effect of the note. It seems strange to endeavour to construe words which have one meaning, so as to give them another and a different meaning. Those words cannot apply to a presentment, and were never intended to mean it.

Judgment for defendant.

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Nov. 24.

SIR FITZROY KELLY, on behalf of the Governor and Company of the Bank of England, had obtained a rule calling on the plaintiff to shew cause why two orders of *Platt*, B., of the 6th and 16th of July last, should not be rescinded.

The following facts appeared from the affidavits in support of the application. In the year 1738, the sums belonging to the suitors in Chancery paid in under decrees or orders of the Court, having accumulated to a very large sum of money, an act of Parliament was passed directing the same to be invested, for account of the parties interested therein and entitled thereto, in stock or annuities to be purchased in the name of the Accountant-General. That was accordingly done, and the several accounts opened under the act have since been popularly termed "The Suitors' Fund." At the date of the said orders, that fund consisted of six several accounts of Government or Parliamentary annuities, standing in the books of the Governor and Company of the Bank of England, kept for the entry of the national debt of Great Britain, in the name of the Accountant-General of the High Court of Chancery, such several accounts having been opened, and the several amounts of stock carried

A judge at chambers having made an order under the 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1, charging an annuity payable out of the "Suitors' Fund," by order of the Lord Chancellor, in pursuance of the provisions of the 46 Geo. 3, c. 128, this Court considering it doubtful whether or no the judge's order was valid, refused to set it aside, as, by so doing, they would deprive the party of the right of appeal. *Quære*, if this Court has jurisdiction over an order of that description.

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to the credit of such accounts, under and by virtue of the following acts of Parliament:—12 Geo. 2, c. 24; 4 Geo. 3, c. 32; 5 Geo. 3, c. 28; 8 & 9 Geo. 3, s. 2, c. 19; 14 Geo. 3, c. 43; and 32 Geo. 3, c. 42. In addition to those accounts, another, or seventh account, was kept in the books of the Bank of England, in the name of the Accountant-General of the Court of Chancery, called the “Cash Balance Account,” which is an account of cash paid in from time to time in the various suits in Chancery, on account of the suitors in Chancery, and to which account is also credited cash received by the Accountant-General, for the dividends and interest accruing from time to time on the stocks and annuities so comprised in the said six several accounts above mentioned. From this account monies are paid under the orders of the Lord Chancellor. The defendant, who was one of the Masters of the Court of Chancery, became entitled to a retiring pension of £1500 per annum, under the 46 Geo. 3, c. 128, and under an order of the Lord Chancellor, dated the 31st of March, 1847, made “In the matter of the Suitors of the High Court of Chancery.” By that order, after reciting the 46 Geo. 3, c. 128, the 3 & 4 Will. 4, c. 84, and a certain order, petition, and deed of resignation of office by the defendant A. H. Lynch, the Lord Chancellor did order “that out of the interest and dividends of the Government or Parliamentary securities, carried or to be carried to the account intitled ‘Account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery,’ and out of the interest and dividends of the Government or Parliamentary securities, carried to the account intitled ‘Account of securities purchased with surplus interest arising from securities carried to an account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery,’ there shall be paid, but subject to and without prejudice to the payment of all salaries and other sums of money, by any act or acts of Parliament not repealed by the said act of the 3 & 4 Will. 4, directed or authorised to be paid thereout

by the Governor and Company of the Bank of England, by virtue of an order or orders of this Court to be made for that purpose, without any draft from the Accountant-General of this Court, the sum of 203*l.* 13*s.*, being the proportionate part of the annual sum of £2500, payable to the said A. H. Lynch, as one of the Masters in ordinary of this Court, and which accrued from the 25th of February last, the last quarterly day of payment thereof, to the said 25th of March instant, the day of the resignation of the said A. H. Lynch, (both days inclusive). And his Lordship doth hereby, on the ground that the said A. H. Lynch is afflicted with permanent infirmity, disabling him from the due execution of his office, further order, that out of the dividends and interest of the Government or Parliamentary securities carried to the said account, intituled 'Account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery,' and out of the interest and dividends of any Government or Parliamentary securities, after the passing of the said act, 46 Geo. 3, to be purchased and placed to the last-mentioned account, but subject and without prejudice to the payment of all salaries and other sums of money by the several acts of Parliament in the said act, 46 Geo. 3, mentioned or referred to, directed or authorised to be paid thereout, there shall be paid by the Governor and Company of the Bank of England to the said A. H. Lynch an annuity or clear yearly sum of £1500, by even and equal quarterly payments, on the 5th day of January, the 5th day of April, the 5th day of July, and the 10th day of October, in every year, from the period of his resigning his said office, for and during the term of his natural life, free from Parliamentary taxes; the first quarterly payment thereof to be made on the 5th day of July next, without any draft from the said Accountant-General for that purpose; and his Lordship doth order that there be paid in like manner, but subject as lastly hereinbefore mentioned, to the said A. H. Lynch, on the 5th day of April next, the sum of 41*l.* 13*s.* 4*d.*, being the proportionate

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part of the said annuity or clear yearly sum of £1500, which will have accrued from the said 25th day of March, to the said 5th day of April next, without any draft from the said Accountant-General for that purpose."

There was no appropriation of any part of the said stocks, funds, securities, or monies, for the purpose of paying the said annual sum of £1500, but the Bank of England are in the habit of paying salaries and pensions under the order of the Court of Chancery, to a large amount, out of the said funds. The two sums of 203*l.* 13*s.*, and 41*l.* 13*s.* 4*d.*, mentioned in the above order, were paid on the 11th of May, 1847, by the Bank to the defendant's attorney, duly authorised, out of the general cash balance to the credit of the last-mentioned seventh account.

On the 6th of July, the following order of *Platt, B.*, dated on that day, was served on the Governor and Company of the Bank of England:—" *Witham v. Lynch.* Upon reading the affidavit of the plaintiff, I do order that, unless cause be shewn to the contrary at my chambers, in Rolls'-garden, Chancery-lane, on Tuesday next, at ten o'clock in the forenoon, the annuity of the sum of £1500 a year, payable to the defendant as a superannuated Master of the Court of Chancery, out of the Suitors' Fund standing in the books of the Governor and Company of the Bank of England, in the name of the Accountant-General of the Court of Chancery, stand charged with the payment to the plaintiff of the sum of 4007*l.* 17*s.*, the amount of the judgment-debt in this action, pursuant to the statutes in that case made and provided."

On the 16th of July, the following order absolute by the same judge, dated on that day, was served on the Bank of England:—" *Witham v. Lynch.* Upon hearing counsel on both sides, and upon reading the affidavits of the plaintiff, I do order, that the annuity of the sum of £1500 a year, payable to the defendant as a superannuated Master of the Court of Chancery out of the Suitors' Fund, standing in the books of the Governor and Company of the Bank of England

in the name of the Accountant-General of the Court of Chancery, stand charged with the payment to the plaintiff of the sum of 4007*l.* 17*s.*, the amount of the judgment-debt in this action, pursuant to the statutes in that case made and provided."

These orders were made under the 1 & 2 Vict. c. 110, ss. 14, 15, and the 3 & 4 Vict. c. 82, s. 1 (a).

(a) 1 & 2 Vict. c. 110, s. 14, enacts, "That if any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at Westminster, shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name, in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stocks, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

Sect. 15: "And in order to

prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares hereby authorised to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted, that every order of a judge charging any Government stock, funds, or annuities, or any stock or shares in any public company under this act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to shew cause only; and such order, if any Government stock, funds or annuities standing in the name of the judgment debtor in his own right or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and company of the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company standing in the name of the judgment debtor in his own right or in the name of any person in trust for him, is or are to be affected by any such order, shall

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On the 12th of July, after service of the above order nisi, the quarter's pension due on the 5th of July was demanded

in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or, in case of corporations, to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then, and in such case the corporation or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall, within a time to be mentioned in such order, shew to a judge of one of the superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney, or agent, be made absolute. Provided, that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit."

3 & 4 Vict. c. 82, s. 1 (reciting

1 & 2 Vict. c. 110, s. 14), "And whereas doubts have been entertained whether the said provisions extend to the cases hereinafter mentioned. Now therefore be it declared and enacted, &c., that the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stock, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and whenever any such judgment debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, or annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: Provided always, that no order of any judge as to any stock, funds, annuities,

at the Bank by, and was paid to, the authorised attorney of the defendant, out of the money standing to the credit of the said seventh account. The plaintiff had since brought an action on the case against the Bank of England, to recover damages in respect of that payment.

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Martin and Peacock shewed cause.—The second section of the 46 Geo. 3, c. 128, empowers the Lord Chancellor to order an annuity or yearly sum not exceeding £1500 to be paid out of the dividends and interest of the "Suitors' Fund" to any Master disabled by infirmity from discharging his duty. The effect, therefore, of the order of the 31st of March, 1847, was to create an annuity payable by the Bank of England during the life of Master Lynch. No doubt the annuity was dependent on the existence of the fund out of which it was payable, but there was no more uncertainty of payment than in the case of any other annuity. Though the sixth section provides that the securities shall remain liable to answer all demands of the suitors, the accumulations of compound interest have created a fund far greater than the suitors could ever exhaust. [*Rolfe, B.*—Suppose the value of stock fell to such an extent that the fund proved insufficient to pay all the suitors, then this annuity would fail.] Every annuity is subject to contingencies of a similar description. It is conceded that the words

or shares standing in the name of the Accountant-General of the Court of Chancery or the Accountant-General of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and Company of the Bank of England or any public company from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual

payments thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor with the amount of the sum to be mentioned in any such order."

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"Government stock, funds, or annuities," in the fourteenth section of the 1 & 2 Vict. c. 110, refer only to the ordinary public securities; but the language of the 3 & 4 Vict. c. 82 is more comprehensive. The first section of that act, after reciting the fourteenth section of the 1 & 2 Vict. c. 110, enacts, that the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares." And whenever the judgment debtor shall have any interest in stock, funds, annuities, or shares standing in the name of the Accountant-General of the Court of Chancery, the judge may make an order as to such stock, &c. or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of the judgment debtor. Here the defendant had a clear vested estate in possession in the annual produce of the funds standing in the name of the Accountant-General of the Court of Chancery. But if these orders are not within the acts of Parliament, then they are of no effect, and it is unnecessary to set them aside. And if the question is at all doubtful, the Court will allow the orders to stand, since, by setting them aside, the plaintiff will be deprived of his right of appeal, which may be ultimately made to the House of Lords.

Sir *Fitzroy Kelly* and Sir *J. Bayley*, in support of the rule.—The form of the Lord Chancellor's order, and the terms of the statute on which it is founded, plainly shew that these orders are invalid. Under the 1 & 2 Vict. c. 110, s. 14, the property to be charged must be Government stock, funds, or annuities standing in the Bank books in the name of the judgment debtor, or of some person in trust for him. The 3 & 4 Vict. c. 82, enacts, that the provisions of the

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1 & 2 Vict. c. 110, s. 14, shall be deemed and taken to extend to the interest of any judgment debtor, as well in "any such stock, funds, annuities, or shares," as also in the dividends, interest, and annual produce of such stock, &c. That statute does not vary the description of property which may be charged, but only superadds "stock, funds, or annuities standing in the name of the Accountant-General of the Court of Chancery," which means stock of some individual paid into court to the credit of the Accountant-General. This is not an annuity of that description, but "a pension" payable out of a particular fund belonging to the suitors of the Court. The Lord Chancellor's order shews upon the face of it that there are no specific dividends which can be charged, or which the Bank can be restrained from transferring. There is no annuity existing in the name of the Accountant-General. It is evident from the sixth section of the 46 Geo. 3, c. 128, that the legislature never intended to appropriate the suitors' money to their prejudice, and if the whole could by any possibility be claimed by the rightful owners, this annuity would cease. It is not an "interest" in stock within the 3 & 4 Vict. c. 82. [Alderson, B.—Have we any jurisdiction over these orders? They are not orders over which this Court can exercise any control, but orders to be enforced by the Lord Chancellor. Our jurisdiction only extends to cases where the order of the judge must be considered as the act of the Court. Parke, B.—Whenever a jurisdiction is conferred by statute on a judge of the superior courts, it is subject to appeal to the Court, unless there is something in the context leading to a contrary conclusion.] In the case of *Morris v. Manesty* (a), the Court of Queen's Bench set aside an order nisi of a judge charging a pension granted to the defendant by the East India Company. [Alderson, B.—It does not appear in that case that the point was taken as to the juris-

(a) 7 Q. B. 674.

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diction of the Court.] The question was in truth the same as in the present case, though here there is a final order. [Alderson, B.—Then *Morris v. Manesty* overrules *Brown v. Bamford* (a).] Both those cases are authorities to shew that the Court has jurisdiction to rescind these orders. [Alderson, B.—*Brown v. Bamford* is right to this extent, that the Court will not interfere until there is an order absolute.] The power given to the judge might affect the whole public stocks of the kingdom, and ought, therefore, to be subject to review by the Court.

POLLOCK, C. B.—We are all of opinion that my Brother *Platt's* orders ought not to be set aside; not because we have come to any clear opinion on the point, but sufficient doubt is raised to induce us to think that we ought to let these orders stand. If we were to set them aside, we should conclusively prevent the question from being taken to a court of appeal. I abstain from giving any opinion on the construction of the acts of Parliament, or whether we have any power to set aside the orders. Whatever may be ultimately done, the question is too doubtful for us to decide it. If the orders be good, they will stand: if not, they may be set aside by another Court.

PARKE, B., concurred.

ALDERSON, B.—The question is too doubtful for us to act affirmatively either way.

ROLFE, B.—The plaintiff had better not force the Court to a decision on the point.

Rule discharged.

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REGINA v. SPELLER.

SPECIAL case under 7 & 8 Geo. 4, c. 53, s. 84.—This was an appeal from the judgment of three justices of the peace for the county of Hertford, upon an information under the stat. 7 & 8 Geo. 4, c. 52, s. 33, exhibited by order of the commissioners of excise, by one George Thorne, an officer of excise, against Charles Speller, a licensed maltster at Hockerill, in the county of Hertford, for that, on the 31st of March, 1846, a quantity of corn and grain then and there making into malt was found in a certain couch-frame of him the said C. Speller, so hard, close, and compact, as it could not have been unless the same had by some means or other been forced together therein, contrary, &c., whereby, &c. The information, which is set out at length in the record of conviction, a copy of which is annexed, was heard on the 13th day of August, 1846, before three of her Majesty's justices of the peace for the said county, when they convicted the said C. Speller, and adjudged him to have forfeited the sum of £100 for the offence aforesaid, which sum they mitigated to £25. Whereupon the said C. Speller duly gave the necessary notices of his intention to appeal against the conviction aforesaid to the then next general quarter sessions of the peace for the county aforesaid, and duly made the necessary deposit of the amount of the said mitigated penalty; and the said justices thereupon returned to the said court of general quarter sessions the record of the said conviction, and the said appeal was duly heard and prosecuted by and before the said court of

By stat. 7 & 8 Geo. 4, c. 52, s. 33, a maltster is liable to a penalty for treading or forcing together in the couch-frame any grain making into malt. The 1 Vict. c. 49, s. 5, enacts, that any excise officer, upon suspicion of the grain having been trodden or forced together, may throw the grain out of the couch-frame, and return it and lay it level in the couch-frame; and if any increase in the gauge of the grain shall be found, exceeding a certain proportion, then the increase so found shall be taken as *conclusive evidence* that the grain has been trodden or forced together, and the maltster shall thereupon be convicted in a penalty. Upon an information before justices

against the defendant for the penalty, it appeared that the excise officer had, in pursuance of an order of the commissioners of excise, returned the grain by piling it in a cone in the centre of the couch, and then distributing it equally to all parts of the couch. The increase in the grain when thus returned having exceeded that allowed by the act, the defendant was convicted:—*Held*, that the increase in the grain found by such a mode of returning it was conclusive evidence of the offence within the 7 & 8 Geo. 4, c. 52, s. 33, as it did not appear that the mode of proceeding was unfair or improper, and consequently the conviction was right: and that the officer has some, if not an absolute, discretion to exercise in the matter, provided he does not use it improperly.

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quarter sessions; and at such hearing the said court of quarter sessions, at the instance of both parties, confirmed the said conviction, subject to the opinion of the Court of Exchequer, on a question to be agreed upon by the counsel on both sides, which is as follows:—Whether, if an officer of excise, in order to ascertain the amount of increase in the guage of the grain in the couch-frame after such grain has been thrown out of and returned into such couch-frame, as directed by 1 Vict. c. 49, s. 5, do return such grain, or cause it to be returned, into such couch-frame, by placing the whole of such grain in the form of a cone in such couch-frame, as described in the conviction, instead of by casting the grain equally all over the floor of the couch-frame, as is also described in the conviction, and do thereby obtain more than the allowed increase upon guaging the grain after its return to the couch-frame; the justices, upon information, as in the present case, are bound to receive proof of such excessive increase, obtained by such means, as conclusive evidence of such grain having been trodden or forced together in such couch-frame before it was so thrown out as aforesaid, within the meaning of the said acts of Parliament, and to convict accordingly.

If the Court of Exchequer should be of opinion that the justices are, under such circumstances, bound to receive such proof as such conclusive evidence as aforesaid, then the said judgment of the said court of quarter sessions is to be confirmed; if otherwise, the said judgment and conviction are to be quashed.

Either party is to be at liberty to refer to the copy of the record of the said conviction hereunto annexed, and the evidence therein set forth, all which are to be taken as part of the case, and the Court to draw such inferences of fact as it may think fit, and no objection in point of form is to be taken by either party (a).

(a) 7 & 8 Geo. 4, c. 52, s. 33, maker of malt shall tread or force
 enacts, that if any maltster or together any corn or grain mak-

It is only so far necessary to notice the conviction, as to state that it appeared by the evidence of the excise officers

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ing into malt in the cistern or couch-frame, or if any corn or grain making into malt shall be found in any cistern or couch-frame, so hard, close and compact, as it could not have been unless the same had by some means or other been trodden or forced together therein, every maltster or maker of malt who shall tread or force together such corn or grain as aforesaid, or in whose cistern or couch-frame such corn or grain shall be found so hard, close, and compact as aforesaid, shall for every such offence forfeit and lose the sum of £100.

1 Vict. c. 49, s. 5, enacts, that when any officer of excise shall suspect that the corn or grain making into malt in any cistern or couch-frame has been trodden or forced together, or that the corn or grain so making into malt therein is so hard, close, and compact, as it could not have been unless the same had been by some means or other trodden or forced together in such cistern or couch-frame, it shall be lawful for such officer to direct the maltster or maker of malt, or his workmen and servants, to throw all such corn or grain from and out of the cistern or couch-frame, and for such officer, and any person or persons in his aid or assistance, which aid and assistance the maltster, or his workmen and servants, shall also give if required, to return all such corn or grain into the cis-

tern or couch from which the same shall have been thrown, and to lay the whole of such corn or grain level again in such cistern or couch; and if any increase shall be found in the gauge or quantity of such corn or grain, after being returned into and laid level again in the cistern or couch-frame, over and above the former gauge taken before the same was thrown out, in any greater proportions than those of five bushels in every one hundred bushels previously to such corn or grain having been emptied eight hours from the cistern, or six bushels in every one hundred bushels if such corn or grain shall have been emptied from the cistern eight hours, and not emptied sixteen hours; or seven bushels in every one hundred bushels if such corn or grain shall have been emptied from the cistern sixteen hours or upwards, the increase so respectively found as aforesaid shall be deemed conclusive evidence of such corn or grain having been trodden or forced together; and the Court or justice before whom such evidence shall be given shall thereupon convict the maltster or maker of malt in the penalty imposed by the said recited act of the 7th & 8th year of his said Majesty's reign; and every maltster or maker of malt who, or whose servants or workmen, shall when directed by any officer of excise refuse to throw out any corn or

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before the magistrates, that the method of filling the couch-frames by means of cones had been practised about two years, and that such a course had been adopted by an order of the commissioners of excise ; and that, on the other hand, it appeared from the evidence of the appellant's witnesses, that this method of filling the couch-frame had been of comparatively recent adoption, the previous method having been to throw the grain equally all over the couch-frames, and that by the new mode of proceeding, the bulk of the grain was increased to the extent of nine or ten per cent. more than it was under the old mode.

This case was argued on the 22nd of November, in the present term, by

The Attorney-General (with whom were *Ryland* and *Wordsworth*) for the Crown.—The simple question, as taken with the evidence, is whether, in returning the malt into the couch-frame for the purpose of taking a second gauge, the officers are allowed to place it in the first instance in the shape of a cone in the centre, and then to spread it equally, or whether they are to throw it violently into the couch-frame, so as to give the trader the benefit of the compression. The 5th sect. of 1 Vict. c. 49, says, that the increase found after the malt has been returned and laid level shall be conclusive evidence of compression. How is the increase to be ascertained? The test for the purpose of ascertaining duty on malt may be taken by the excise at various stages. The grain increases in bulk during the process of malting, and several statutes have been passed for the purpose of allowing a certain increase, without subjecting the trader to

grain making into malt from any cistern or couch, or to aid or assist, if required so to do, in returning the same into the cistern or couch from which the same shall have been thrown, shall for-

feit £100: provided always, that it shall be lawful to prove by any other or different evidence that such corn or grain had been trodden or forced together."

any penal consequences. The increase was calculated for the purpose of protecting the revenue, and not, as may be contended on the other side, as an indulgence to the trader. If the increase is beyond a certain limit, then, as it is known that the grain cannot fairly have increased to that extent, it is declared that such increase shall be evidence of fraud. The 41 Geo. 3, c. 91, is the first act which empowered the officers to remove the grain from the couch-frame, and lay it level in the malt-house, for the purpose of taking the guage, and thereby of ascertaining whether the grain had been unfairly compressed. By the 48 Geo. 3, c. 74, which is the next act upon the subject, a new mode was adopted of ascertaining whether the grain had been unfairly compressed, viz. by returning or throwing the grain back again into the couch, and if a certain increase was found, certain consequences were to follow. The words of this act are in the alternative:—"returning *or* throwing such corn or grain back into and laying the same level in the couch." The manner in which the grain was to be returned is not specified in the act. Then comes the 7 & 8 Geo. 4, c. 52, upon the 33rd sect. of which this information is founded. By the 34th sect., the officers are empowered to take the guage by throwing the grain out and by returning it, or by turning it over in the couch. Lastly follows the act of 1 Vict. c. 49, and upon the words of the 5th sect. of that act the question turns. The words "return" and "throw" are used indifferently in this section. It is admitted that the officers have returned the malt into the couch-frame; but the contention is, that they were at liberty to do so only in a particular manner—that it should have been returned in such a manner as was practised at the time of the passing of the act. It also appears from the different statutes which have been passed on this subject, that there has been a long course of experiments in the excise for the purpose of detecting frauds of this nature upon the revenue, and that the practice as to the method of taking the guage

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has frequently varied. The present method was introduced by an order of the commissioners of excise, for the purpose of rendering the method of returning the grain uniform.

Wilkins, Serjt. (with whom was *Marsh*), contra.—The object of the legislature, in passing the 1 Vict. c. 49, was to ascertain the increase of the gauge of the *grain*; it was not intended that atmospheric air should be gauged. This method of returning the grain is only of two years' date, whereas the statute 1 Vict. c. 49 was passed ten years ago. This plan of returning the grain makes a difference of ten per cent. over the previous method, against the trader. It was the intention of the legislature that the grain should be returned into the couch in a fair and tradesmanlike manner, and in such a manner as was practised at the time the act was passed, and that plan was to throw it over the whole of the couch. It is the duty of the magistrates to ascertain whether there is such an increase of grain as, in the contemplation of the legislature, was necessary to subject the maltster to the penalties of the act. The present method is unfair to the trader and the public. The magistrates cannot be bound by such a method of returning the grain as renders the increase undue and unfair.

The *Attorney-General* in reply.—This question turns upon the words of the statute, and it is the most expedient course not to depart from them. This mode of proceeding was ordered to be used by the commissioners of excise, as being a fair mode, and also in order that the practice might be uniform. The act gives no direction whatever as to the mode in which the return of the grain is to be made. The allowance given to the trader is intended to cover any loss the honest trader might incur by the increase of the grain. The officer is allowed to use his discretion in returning the grain.

PARKE, B.—The whole question depends upon the construction to be put upon the word “return” in the fifth section of the statute 1 Vict. c. 49; that term may mean that the officer is to return the grain at his discretion, or in a fair way, or in the usual way. The former relieves the magistrates from any discretion at all; if the excise officer has used his discretion, they are bound by that. If it means in a fair mode, or in the usual mode, it would rest with the magistrates to decide whether the mode was fair or usual.

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Cur. adv. vult.

The judgment of the Court was now pronounced by

POLLOCK, C. B.—In this case the question turns upon the true construction of the fifth section of the 1 Vict. c. 49. [His Lordship read the section, and proceeded.] Upon an information before the magistrates, there was a conviction under the authority of the 7 & 8 Geo. 4, c. 52, s. 33; and by the 7 & 8 Geo. 4, c. 53, s. 84, upon an appeal to the quarter sessions, a case was reserved for the opinion of this Court. That case was merely whether, if an officer of excise, in order to ascertain the amount of increase in the gauge of the grain in the couch-frame, after such grain has been thrown out of, and returned into, such couch-frame, as directed by 1 Vict. c. 49, s. 5, do return such grain, or cause it to be returned into such couch-frame, by placing the whole of the grain in the form of a cone in the couch-frame, instead of by casting the grain equally all over the floor of the couch-frame, and do thereby obtain more than the allowed increase upon gauging the grain after its return to the couch-frame, the justices, upon information, are bound to receive proof of such excessive increase obtained by such means, as conclusive evidence under this act of Parliament of such grain having been trodden or forced together in the

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couch-frame before it was thrown out, an offence to which a penalty is attached by 7 & 8 Geo. 4, c. 52. The express form of the case was that which has just been stated, but in other words the case submitted to us was, whether upon the evidence before the magistrates the conviction was proper.

The exciseman, in obedience to a previous order of the commissioners of excise (which had been made that there might be one uniform mode of proceeding), had returned the grain into the couch-frame by piling it up in the centre in the form of a cone, and by then distributing it over all parts of the couch alike, and it was argued that that mode of proceeding ought not to be taken as conclusive, and that the conviction could not be sustained.

Without saying what would have been the result, if it had been found as a fact before us that the mode adopted by the exciseman was an improper mode, and without saying what would have been the result if any other facts had been found than those which are before us, we are of opinion, that upon that which is found, this evidence is to be taken as conclusive evidence, and that the course which the exciseman has taken has been literally within the act, in returning the grain or corn into the couch-frame, and that thereupon an increase has been found within the meaning of the act of Parliament.

It was argued for the appellant, that this was a mode of returning the grain which was calculated to work more injuriously to the maltster with reference to the penalty, and to the public with respect to the duty, than any other mode of proceeding. Upon examining the evidence, we cannot discover that that is made out, nor is it quite certain that if it were so—unless it should appear that the mode of proceeding was entirely improper—any other conclusion could be arrived at; and certainly there is no evidence which can lead us to the conclusion that the mode adopted by the ex-

ciseman was an improper mode. It was also argued that one mode of putting the question was, whether the statute was to be read as if the officer was to return it in such a manner as he should think fit, or whether the statute was to be read that he shall return it in such a manner as is now in use. We are disposed to think that such is not a proper mode of looking at the question. We are not to construe the act by putting either of these modes into it. It may be that the excise officer is not altogether at liberty to use his discretion; it may be that the act of Parliament is not confined to those methods which were in use at the time the act was passed: but we think it is clear that the excise officer has some discretion to exercise upon the subject, and that in the particular case which is before us it does not appear that he exercised any improper discretion, or adopted a course which was not calculated to do justice between the subject and the Crown. We are therefore of opinion that the conviction must be affirmed.

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ROLFE, B., added—We do not mean to be understood to say that the officer may not have an absolute discretion.

POLLOCK, C. B.—It is not necessary to say that.

Conviction affirmed.

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Nov. 6.

BLACK v. BAXENDALE and Others.

The plaintiff sent certain goods by the defendants, carriers, to be delivered in Bedford on a Thursday, in order to be ready for the market on Saturday, but did not give notice that they were sent for that purpose: on that day his clerk proceeded there, and owing to the non-delivery of the goods till the Monday following, he removed them to another place for sale:—*Held*, in an action for the non-delivery of the goods within a reasonable time, that the expenses so incurred might be given by the jury as damages.

CASE.—The second count of the declaration stated, that the plaintiffs caused to be delivered five bundles of haycloths, to be carried by the defendants from London to Bedford, and there delivered to the plaintiffs within a reasonable time, for a certain reward in that behalf, whereby it became the duty of the defendants to deliver the said goods within a reasonable time, yet the defendants did not deliver the same within such reasonable time, by reason whereof the plaintiff and his agents, who made journeys to Bedford for the purpose of selling the said goods, were put to great trouble, expense, and loss of time, and also lost the profits which would have accrued to them from the sale of the said goods in Bedford market.

Pleas, first, not guilty; secondly, a traverse of the delivery of the goods; and lastly, leave and license; and upon these pleas issue was joined.

At the trial, before *Pollock*, C. B., at the London Sittings after Trinity Term last, it appeared that the goods in question were delivered at the defendants' office upon Thursday the 22nd of October, 1846, for the purpose of going by rail to Bedford. It was expected by the plaintiff that the goods would arrive on the Saturday following, but no notice was given to the defendants that it was necessary that such should be the case in order that the goods might be ready for the market. On Saturday the plaintiff's clerk proceeded to Bedford, and owing to the non-arrival of the goods until Monday, he was obliged to remove them to St. Neot's, to sell them there. The expense of the removal was 10s., and his own expenses and wages amounted to a guinea per diem in addition. The Lord Chief Baron directed the jury that they were at liberty to give these

expenses as damages if they should think fit. The jury found a verdict on the second count for the plaintiff, damages 10*l*.

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Martin now moved for a new trial, on the ground of misdirection.—It was not a reasonable consequence of the breach of the contract by the carriers, that a person should go to Bedford. The defendants are not responsible for the expenses of a person sent after the goods, when they had *no notice* for what purpose the goods were sent. It would not be reasonable to send a person to Edinburgh, if the goods had been sent to that place. The jury should therefore have been directed as a matter of law that the defendants were not liable for these expenses.

PARKE, B.—I think there ought to be no rule. The defendants are responsible only for reasonable consequences of their breach of contract. It was a question for the jury whether it was reasonable and proper to send a man down to Bedford to look after the goods. If he went down unnecessarily, or remained there an unreasonable time, the defendants ought not to pay the expenses. The damages given by the jury were too large, but as they were under 20*l*., you cannot have a new trial, there being no misdirection.

ALDERSON, B.—Whether these expenses were reasonable was entirely a question for the jury. The law has been correctly laid down, but the jury were wrong. If the damages had been sufficient in amount to warrant a new trial, there would have been one on the ground of the damages being too large.

ROLFE, B., concurred.

POLLOCK, C. B.—The jury were wrong in giving too

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large an amount of damages. If the carriers had had distinct notice that the goods would be required to be delivered at a particular time, perhaps they would have been liable for those expenses, for which, without such notice, they would not otherwise be liable; but whether any particular class of expenses is reasonable or not depends upon the usage of trade, and various other circumstances. It is not a question for the Judge, but for the jury, to decide what are reasonable expenses.

Rule refused.

SHAW v. KAY.

Nov. 6.

In an action for the breach of a covenant for repair in a lease, a tenant is not liable for acts done before the time of the execution of the lease, although the habendum of the lease states the premises to be held from a day prior to its execution.

The habendum in a lease only marks the duration of the tenant's interest, and its operation as a grant is merely prospective.

COVENANT upon an indenture of lease, dated the 9th of November, 1842, whereby the plaintiff demised a shop and dwelling-house to the defendant, subject to certain covenants to repair. Breach, that the defendant pulled down and destroyed a great part of the dwelling-house.

Pleas, non est factum, and a traverse of the breach alleged in the declaration.

At the trial, before *Wightman*, J., at the last Lancashire Summer Assizes, it appeared that the defendant became tenant of the premises in question in June, 1842, and had then commenced to pull down and make alterations in the premises.

On the 9th of November, 1842, the lease in question was executed, which stated that the premises were to be held from the 22nd of June then last past. The learned Judge ruled that the plaintiff was not entitled to recover for the acts complained of which were done before the day of the execution of the lease.

The jury returned a verdict for the plaintiff, with one farthing damages.

Knowles now moved for a new trial, on the ground of misdirection.—The learned judge was incorrect in ruling that the plaintiff was not entitled to recover for what had been done by the tenant before the execution of the lease. The lease took effect from the 22nd of June preceding. [*Parke, B.*—That date merely defines the duration of the term; no interest in the premises passed until the execution of the lease.] *Lewis v. Hillard* (a) was an action on a lease for years, which contained a covenant to save the tenant harmless from all eviction during the term. The Court held, that the words “during the term” were to be construed during the term in computation of time, and not only from the time of the delivery of the deed, when it commenced in interest: and that an eviction, even before such delivery, entitled the tenant to an action. [*Parke, B.*—It was laid down by *Eyre, C. J.*, in *Wyburd v. Tuck* (b), as a point upon which there could be no doubt, that “the *habendum* of the plaintiff’s lease can only be considered as marking the duration of his interest, and its operation as a grant is merely prospective.” That is rather a difficult case to meet.]

PER CURIAM (c).—There will be no rule.

Rule refused.

(a) 1 Sid. 374.

(b) 1 Bos. & Pul. 484.

(c) *Pollock, C. B., Parke, B., Alderson, B., and Rolfe, B.*

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Nov. 9.

DOE *d.* ROBERTS *v.* WILLIAMS.

The following devise was held to pass an estate in fee-simple :

—" I devise and bequeath all my real and personal estate, monies, securities for money, and all other my real and personal estate, of what nature or kind soever and wheresoever the same may be, which I am now possessed of, or which at any time hereafter I may be possessed of or entitled unto, subject to the payment of all my just debts, funeral and testamentary expenses, and the expense of proving this my will, unto my dear wife Catherine, to and for her sole and separate use and benefit."

EJECTMENT to recover possession of a tenement and land, called Penybanc, situated in the parish of Llandwrog, in the county of Carnarvon.

At the trial, before *Maule, J.*, at the last Summer Assizes for Carnarvonshire, it appeared that the lessor of the plaintiff claimed the property as heir-at-law of one Thomas Roberts, who died in 1833. Thomas Roberts had made a will as follows:—" I give, devise, and bequeath all my real and personal estate, monies, securities for money, and all other my real and personal estate, of what nature or kind soever and wheresoever the same may be, which I am now possessed of, or which at any time hereafter I may be possessed of or entitled unto, subject to the payment of all my just debts, funeral and testamentary expenses, and the expense of proving this my will, unto my dear wife Catherine, to and for her sole and separate use and benefit." The defendant claimed under the will of the testator's wife, Catherine Roberts, who died in 1842. It was contended, on the part of the plaintiff, that the wife took an estate for life only under the will. The learned judge, however, was of opinion that she took an estate in fee-simple, and directed the jury to find a verdict for the defendant, but gave leave to the plaintiff to move to enter a verdict, if the Court should be of a contrary opinion.

Townsend now moved accordingly. — The question is, whether this will of the testator passed an estate in fee-simple, or merely an estate for life. In *Moor v. Dent (a)*, where the words of the devise were, " All the rest of my lands, tenements, and hereditaments, either freehold or copyhold, what-

soever and wheresoever; and also all my goods, &c., *after payment of my just debts and funeral expenses*," it was held that no more passed by this devise than an estate for life. In *Goodtitle v. Maddern* (a), *Grose, J.*, says, "The rule has been long established, that, if the executor be bound to pay the debts by the terms of the devise, he must take a fee in the lands devised to him in respect of which such obligation is thrown upon him; but if he be only to pay them out of the produce of the land devised, or only to take the land *after* payment of debts, then, without words of inheritance, the fee will not pass."—He also referred to *Sanderson v. Dobson* (b).

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PER CURIAM (c).—We are clearly of opinion that Catherine Roberts took an estate in fee-simple under the will of Thomas Roberts, by force of the words "all my *real* and personal *estate*." There will therefore be no rule.

Rule refused.

(a) 4 East, 500.

(b) Ante, 141.

(c) *Pollock, C. B., Parke, B., Alderson, B., Rolfe, B.*

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Nov. 13.

OLLIVE v. BOOKER.

To an action for not loading a vessel in pursuance of the terms of a charterparty, the defendant pleaded, setting out the whole of the charterparty, which stated, that it was agreed between the plaintiff, "original charterer of the good ship or vessel called The Dove A. 1, of the measurement of 149 tons, or thereabouts, now at sea, having sailed three weeks ago, or thereabouts," and the defendant, that the ship, being tight, staunch, &c., should proceed to Marseilles (after having delivered her cargo at Genoa), and there load certain goods of the defendant, and therewith proceed to a safe port in the United Kingdom, calling at Cork or Falmouth for a certain rate of freight; thirty working days to be allowed, Sundays excepted. The plea then averred, that time was an essential and material part of the contract; and the probable situation of the vessel with reference to the date of her sailing, and the object of her voyage, was also an essential and material part of the contract, and that, in point of fact, at the time of the making the charterparty, the vessel had not sailed three weeks, but a materially and unreasonably later time, of which the defendant had no notice or knowledge, for which cause the defendant neglected and refused to load the vessel:—*Held*, that the time at which the vessel sailed was material, that that statement in the charterparty amounted to a warranty, and that the defendant was entitled to retain his verdict upon the plea, on motion for judgment non obstante veredicto.

Semble, per *Parke, B.*, that the averment that the plaintiff knew the time the vessel sailed was immaterial.

ASSUMPSIT. The first count of the declaration stated, that before and at the time of the making of the promise hereinafter mentioned, the plaintiff was lawfully possessed of the ship or vessel hereinafter mentioned, under and by virtue of a certain charterparty of affreightment theretofore &c., made between one A. B., the master of the said ship or vessel, and the plaintiff; and the plaintiff being so possessed of the said ship or vessel as aforesaid, it was theretofore &c. agreed between the plaintiff and the defendant, by a certain other charterparty of affreightment then made in writing between the plaintiff, therein described as original charterer of the good ship or vessel called The Dove A 1, of the measurement of 149 tons or thereabouts, therein alleged to be at sea, having sailed three weeks before, and the defendant, therein described as of London, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, should, with all convenient speed, sail and proceed to Marseilles, after having delivered her cargo at Genoa for the ship's account, or so near thereto as she might safely get, and there load from the factors of the defendant a full cargo of linseed or other goods, which the defendant bound himself to ship, not exceeding what she could reasonably stow and carry over and above &c., and, being so loaded, should therewith proceed to one safe port in the United Kingdom, calling at Cork or Falmouth

for orders, which were to be given in due course of post, or so near thereto as she might safely get, and deliver the same on being paid freight, and after the rate &c. : the act of God &c. excepted. The freight was to be paid on unloading and right delivery of the cargo—one-third in cash, and the remainder by an approved bill on London, at three months' date. Thirty working days were to be allowed (Sundays excepted) to the defendant (if the ship was not sooner dispatched) for loading the said ship at Marseilles, and unloading at the return port. Averment of mutual promises, and general allegation of performance. Breach, that although the said ship, being tight, staunch, and strong, and every way fitted for the said voyage &c., did, after the making of the said last-mentioned charterparty, in pursuance of the terms thereof, with all convenient speed sail and proceed to Marseilles, and after having delivered her cargo at Genoa, was duly consigned to the defendant's agents at Marseilles, to wit, on &c., and within a reasonable time after the making of the said last-mentioned charterparty, of all of which the defendant then had notice; and although the plaintiff was then and there, and during the space of thirty working days then next following, and during a reasonable number of, to wit, ten days, on demurrage, upon the expiration of the said space of thirty working days, which said last-mentioned period had elapsed before the commencement of this suit, ready and willing to receive on board the said ship or vessel, and load from the factors of the defendant a full cargo of linseed or other goods, according to the terms and effect of the said last-mentioned charterparty, of which the defendant then, to wit &c., had notice: yet the defendant did not nor would, within the space of the said thirty working days in the said last-mentioned charterparty, ship a full cargo of linseed or other goods, according to the terms of the said last-mentioned charterparty, in or on board the said ship or vessel, according to the tenor and effect of the said last-mentioned charter-

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party, and of his said promise aforesaid, but, on the contrary, the defendant both neglected &c.

Eighth plea, as to the first count:—The defendant says, that the said charterparty made between the plaintiff and the defendant was and is made in the words and figures following, that is to say: “London, 24th December, 1844. Charterparty. It is this day mutually agreed between Messrs. Ollive, Nephew, & Co., original charterers of the good ship or vessel called The Dove A. 1, of the measurement of 149 tons, or thereabouts, *now at sea, having sailed three weeks ago*, and Messrs. Booker & Co., merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Marseilles, (after having delivered her cargo at Genoa, for ship’s account), or so near thereunto as she may safely get, and there load from the factors of the said charterers a full cargo of linseed or other goods, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded, shall therewith proceed to one safe port in the United Kingdom, calling at Cork or Falmouth for orders, which are to be given in due course of post, or so near thereunto as she may get, and deliver the same on being paid freight at and after the rate of 5s. 6d. per imperial quarter for linseed, or other goods in full proportion, according to the London printed rates delivered: the act of God, restraints of princes and rulers, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage, always excepted. The freight to be paid on unloading and right delivery of the cargo, one-third in cash, and the remainder by an approved bill on London, at three months’ date. Thirty working days are to be allowed, Sundays excepted, the said merchant (if the ship is not sooner dispatched) for loading the

said ship at Marseilles, and unloading at the return port; mats and bulk heads to be found by the charterers, and dunnage by the ship, and — days on demurrage, over and above the said laying days, at 4*l.* per day; the penalty for the non-performance of this agreement, 400*l.*; the vessel to be consigned to the freighter's agents at Marseilles; cash for usual disbursements at Marseilles, free of interest and commission, but the insurance bills of lading to be signed for more or less freight, without prejudice to the charterparty. Per proc. Booker & Co.; Thomas Booker, jun.; Ed. Ollive, Nephew, & Co.; John Aitkin, witness to the signature of Messrs. Booker & Co., and of Messrs. Ed. Ollive & Co. The commission on this charterparty is at 5*l.* per cent., due ship lost or not lost. The vessel to be addressed to Alexander Howden or his agents, at the port of discharge." And the defendant avers, that upon the making of the said charterparty, time was an essential and material part of the contract, and that the probable situation of the vessel, with reference to the date of her sailing, was also a material and essential part of the contract, to wit, with reference to the object of the said voyage, and the distance of the said port of Marseilles, and the nature of the said intended cargo, and the time of year at which the said charterparty was made. And the defendant further says, that, in point of fact, at the time of the making of the said charterparty, the said vessel had not sailed three weeks before, but on the contrary, had sailed at a materially and unreasonably later time, to wit, one week later, which the plaintiff, at the time of the making of the said charterparty, knew, and whereof the defendant had no notice or knowledge, wherefore the defendant wholly declined to accept or employ the said vessel under the said charterparty, to wit, immediately upon learning and knowing that the said vessel had not sailed, as in the said charterparty set forth, to wit, upon the 1st of February, 1845, and wholly neglected and refused to load any cargo on board her, to wit, upon the day and

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year last aforesaid, as he lawfully might for the cause aforesaid.—Verification.

Replication, de injuriâ.

At the trial, at the sittings after last Hilary Term, before the Lord Chief Baron, a verdict was found for the plaintiff upon all the issues, except those raised by the 8th, 9th, and 11th pleas, and upon these issues the defendant had a verdict,—leave being reserved to the plaintiff to move to enter a verdict upon them also.

Crowder having obtained a rule *nisi* accordingly, and also for judgment non obstante veredicto upon the eighth plea (a),

Watson and *Greenwood* now shewed cause.—The plaintiff is not entitled to judgment non obstante veredicto upon the eighth plea. The statement in the charterparty, that the vessel was then at sea, and had sailed three weeks, is an essential and most material part of the contract, and was not a mere collateral agreement, for the breach of which an action should have been brought to recover any consequential damages. The defendant was not bound to complete his part of the engagement, as this condition was not performed by the plaintiff. The time at which a vessel sails is a most important matter in contracts of affreightment. This is a term which forms the basis of the contract. The case of *Glaholm v. Hays* (b) is a direct authority upon this very point. The words in that charterparty were these—"the vessel to sail from England on or before the 4th of February next," and it was held that the sailing of the vessel on or before that day was a condition precedent. The stipulation

(a) The argument upon that part of the rule relating to the issues upon the 9th and 11th pleas depended upon the facts, and is omitted. *Watson*, on the part of the defendant, had obtained a cross rule to enter a nonsuit upon

the plea of non assumpsit, which was argued immediately after the present case, and was discharged.

(b) 2 Man. & G. 257; 2 Scott, N. R. 471.

in that and the present case is the same; there the vessel was "to sail," here it is affirmed that it "had sailed," at a certain time. The judgment of the Court in *Glaholm v. Hays* is most material, as laying down the principles for the government of the present question. *Tindal*, C. J., there says: "It cannot depend, as Lord *Ellenborough* observes, on any formal arrangement of the words, but (must depend) on the reason and sense of the thing as it is to be collected from the whole contract." And in a subsequent part of the judgment, the whole of which is applicable to the present case, his Lordship proceeds: "Both parties were aware that the whole success of a mercantile adventure does, in ordinary cases, depend upon the commencement of the voyage by a given time. The nature of the commodity to be imported, the state of the foreign and home market at the time the contract of charterparty is made, and the various other calculations which enter into commercial speculations, all combine to shew that dispatch and certainty are of the very first importance to their success; and certainly nothing will so effectually secure both dispatch and certainty, as the knowledge that the obligation of the contract itself shall be made to depend upon the actual performance of the stipulation which relates to them." That doctrine governs the present case. The Lord Chief Justice then distinguishes cases where the cargo had arrived, and the objection, being made at that time, was too late. In *Freeman v. Taylor* (a), which was an action on a charterparty, the defendant had refused to find a cargo in consequence of deviation. *Tindal*, C. J., there said, in the course of his direction to the jury: "If the deviation was so long and unreasonable, that in the ordinary course of mercantile concerns it might be said to put an end to the whole object the freighter had in view in chartering the ship, in that case the contract might

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(a) 8 Bing. 124.

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be considered at an end." The Court held this direction right. It is a condition in contracts on charterparties, that the time at which a vessel shall sail shall either be a reasonable time, or the time which is stipulated: *M^cAndrew v. Adams* (a). In cases where an article is warranted, a person is not bound to accept it unless it comply with the warranty. The term of the vessel's sailing is as much a condition of the charterparty as that she was staunch and strong. (They were then stopped by the Court).

Crowder and *Bovill*, in support of the rule.—This plea affords no answer to the action. The statement in the charterparty, upon which the plea is founded, is a mere representation, and not a condition. The plaintiff might be liable for the breach of it in a cross action. The statement is treated as a representation in the plea, which alleges that the plaintiff, at the time the contract was completed, knew that the said vessel had not sailed three weeks before, but a materially and unreasonable time later. The case of *Glaholm v. Hays* is distinguishable from the present; there it was agreed (after several stipulations)—"the vessel to sail on or before a certain day." The very position of the words distinguishes the two cases; and the time there was future, here it was past. If the word "warrant" had been in the clause, the question would have been different. In *Glaholm v. Hays*, *Tindal*, C. J., says: "The very words themselves, 'to sail on or before a given day,' do, by common usage, import the same as 'conditioned to sail' or 'warranted to sail on or before such a day.'" *Freeman v. Taylor* is not like the present case, the question there being with respect to deviation. There is no statement in this plea that the defendant received any prejudice from the time when the vessel sailed. It is established, that if a matter in a covenant goes to part only of the consi-

(a) 1 Bing. N. C. 29; 1 Scott, 98.

deration, the breach of it is only a ground for a cross action (a).

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PARKE, B.—I am of opinion that the rule for judgment non obstante veredicto on the eighth plea ought to be discharged. It seems to me that the averment in the plea, that at the time of entering into the charterparty the plaintiff knew that the vessel had sailed a materially and unreasonably later time than that which was stipulated for, is an immaterial averment, and might be struck out. The main question, however, in the construction of this plea, is, whether the allegation in the charterparty, of the vessel being “now at sea, having sailed three weeks ago,” is a warranty or a representation. In the construction of agreements, as in the case of contracts under seal, we should endeavour to discover the intention of the parties. Here it is stated that the vessel was now at sea, having sailed three weeks; and if time is of the essence of the contract, no doubt it is a warranty and not a representation. Such, also, is the case in policies of insurance. It appears to me that it is a warranty, and not a representation, that the vessel had sailed three weeks. It is, therefore, a condition precedent. The rule depends upon each particular contract, and here time was of the essence of the contract, as much so as the statement that she was a sound vessel. This being a condition precedent, and not performed, the defendant was not bound to load the vessel. If he had loaded her, the breach of the condition would have been waived, and he would have been liable for the full freight. I entirely agree with the reasoning of *Tindal, C. J.*, in the case of *Glaholm v. Hays*, which I think applies to the present case. There the stipulation was held to be a condition precedent. The defendant was entitled to say that he was not bound to load the vessel, as the condition

(a) *Stavers v. Curling*, 3 Bing. N.C. 355; 3 Scott, 740.

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had not been performed, and that the case was the same as if the vessel had not proved to be A 1, as she was warranted to be. I think, therefore, that the plea affords a good answer, and that the rule for judgment non obstante veredicto ought to be discharged.

ALDERSON, B.—I am of the same opinion. The words which describe the ship as being A 1, amount to a warranty, and the statement that she had sailed for three weeks is equally so. The question whether these words amount to a condition precedent has been decided by *Glaholm v. Hays*; the reasonings there are applicable to the present case, and I am unable to distinguish the two cases.

ROLFE, B.—I am of the same opinion. The stipulation in the present case is not collateral matter, but is a part of the contract. I agree with the rest of the Court, that the case in the Common Pleas governs this. There the stipulation was that the vessel *should* sail, but that makes no difference. The condition was founded upon the object that she should load her cargo in a certain time; and if it had been that she should load in six weeks, that being the length of the voyage, that would be the same as a condition that she should load in the ordinary time, of which she had already been three weeks at sea. I think the case is governed by that in the Common Pleas, which is consistent with common sense and reason. The rule, therefore, for judgment non obstante veredicto must be discharged.

Rule discharged.

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Nov. 16, 20,
23.

ASSUMPSIT for work done, money paid, and on an account stated.

Plea, non assumpsit.

At the trial, at Liverpool, before *Rolfe*, B., at the last Spring Assizes, it appeared that the present action was brought under the following circumstances:—The plaintiff was a sharebroker at Liverpool, and the defendant was a manufacturer, living at Oldham. In July, 1845, the defendant employed the plaintiff to sell for him twenty scrip shares in a certain railway, at 6*l*. 15*s*. per share; they were accordingly sold upon the same day to Messrs. J. Finlay & Son, who were also sharebrokers at Liverpool. The shares were to be paid for on the next settling day. On the day when the shares should have been delivered, the defendant made default, whereupon the purchaser bought an equivalent number at the market price of 11*l*. 12*s*. 6*d*. per share, and called upon the plaintiff to pay him the difference between the contract and the market price. It was proved to be the usage on the Stock Exchange at Liverpool for brokers to be answerable to each other for engagements entered into between them for third parties, and that for this reason the plaintiff paid the demand. It was for the payment so made by the plaintiff, and for commission, that this action was brought. There was some evidence to shew that the defendant was cognizant of the usage, but no point was raised upon that question at the trial. It was objected by the defendant's counsel, that an action would not lie for money paid under such circumstances, and a case was cited as having been shortly before decided by *Alderson*, B., at York, in favour of that position.

The learned judge thereupon directed the jury to find a verdict for the plaintiff for the amount of the commission

The defendant, who resided some distance from Liverpool, authorised the plaintiff, a broker there, to sell for him twenty railway scrip shares. The plaintiff sold them to C., another broker of Liverpool. The scrip shares were not delivered on the day, and C. bought twenty other scrip shares at the market price, and claimed the difference between the contract and the market price. The plaintiff paid him the difference, and brought an action for money paid to recover this sum. It was proved to be the usage amongst brokers at Liverpool, to be responsible to each other upon these contracts, and there was evidence that the defendant was cognizant of this usage:—*Held*, that the defendant was liable.

Semble, per *Parke*, B., and *Rolfe*, B., that the defendant's

knowledge of the usage was immaterial.

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only, but reserved leave to the plaintiff to move to enter a verdict for the full amount claimed.

Knowles having obtained a rule accordingly,

Martin and *C. Saunders* now shewed cause.—The question in the present case is this:—if a person employs another to sell an article for him, and the article is not supplied at the proper time, is the agent at liberty to pay any sum he may think fit, and then sue his employer for it? The defendant was not a sharebroker at Liverpool, and was not bound by the usage there. At different places there may be a different usage, and it surely cannot be said that a person is to be bound by each.

The case of *Child v. Morley* (a) is directly in point. There it was held, that a broker who contracts with others for the sale of stock for a future day by the authority of his principal, who afterwards refuses to make good the bargain, cannot, by paying the difference to such third persons, maintain an action for money paid. *Lawrence, J.*, there says, “If he (Child) acted as broker or agent for Morley, which he legally might, and his contract would then be valid within the statute, he ought in that case to have permitted Morley to settle or act with the purchasers as he pleased, and the plaintiff should not have taken upon himself to pay the money without the consent of his principal, more especially after that principal had refused to pay it. In this general view of the case, the payment by the plaintiff would be at his own peril, and he could not recover in this action as for money paid to the use of the defendant.” [*Parke, B.*—In that case there was no evidence of any custom that the broker was surety for his principal. In *Sutton v. Tatham* (b), Lord *Denman* said, “I think a person employing one who is notoriously a broker, must be

(a) 8 T. R. 610.

(b) 10 Ad. & Ell. 27.

taken to authorise his acting in obedience to the rules of the Stock Exchange;" and Mr. Justice *Littledale* says, "A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he is himself acquainted with the rules by which brokers are governed." In that case the broker was authorised to do his best: there is an absence of any such authority here. In *Lightfoot v. Creed* (a), the defendant contracted with the plaintiff to transfer stock on a certain day, and upon his failing to do so, the plaintiff bought the stock, and sued the defendant for the consequent loss: it was held that the action could not be maintained. [*Parke, B.*—The plaintiff there had no authority from the defendant to buy the stock. The principles upon which the action for money paid is maintainable were well considered in *Brittain v. Lloyd* (b).]—They referred to *Bowlby v. Bell* (c).

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Knowles and *Crompton*, contra, were not called upon.

PARKE, B.—I am of opinion that this rule ought to be made absolute. There is no doubt that, if the plaintiff stood in the place of surety to the defendant, and the plaintiff made a payment for him, the defendant is bound to repay him. This transaction was not for the sale of registered shares, but merely of scrip certificates. The plaintiff was therefore bound to pay. The only question is, whether the plaintiff is to be considered as surety for the defendant. Evidence was given at the trial of its being the established usage on the Stock Exchange at Liverpool, that brokers are responsible for their principals in sales of this description. If there was any doubt as to the existence of this usage, that point should have been made at the trial. No objection, however, of that kind was made; we may therefore assume such to have been the established usage at that place.

(a) 8 Taunt. 268. (b) 14 M. & W. 762. (c) 3 C. B. 284.

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And I consider it to be clear law, that if there is, at a particular place, an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there has an implied authority to act in the usual way; and if it be the usage that he should make the contract in his own name, he has authority to do so. Supposing it were necessary to shew that the defendant knew of the particular usage, the point should have been made at the trial; and in the present case there was evidence for the jury to find that the defendant did know of it, and that he was responsible. It is not now necessary to decide the point, whether the defendant would be bound if he did not know of such a usage. It appears to me, however, that a person who authorises another to contract for him, authorises him to make that contract in the usual way. There are some cases which look the other way, which have not been noticed. There is the case of *Bartlett v. Pentland* (a); that, however, was not with respect to the usage of the Stock Exchange, but of insurance brokers; and it was there held that the custom which prevailed at Lloyd's Coffee-house was not binding on a party who was not shewn to be cognizant of it, or to have assented to it. That, however, is a different question from the present, which is one of contract. In the case of a contract which a person orders another to make for him, he is bound by that contract if it is made in the usual way.

There is another case of *Gabay v. Lloyd* (b), which was an action on a policy of insurance. It was found in the special verdict, that a certain usage with respect to such policies prevailed amongst the underwriters subscribing policies at Lloyd's Coffee-house, and that the policy in question was effected there; but it was not found that the plaintiff was in the habit of effecting policies at that place. The Court held, that this usage was not sufficient to bind the plaintiff.

(a) 10 B. & C. 760.

(b) 3 B. & C. 793.

But that case differs from the present, the question here being as to the authority which the plaintiff received. I have said this in order to shew my concurrence in the opinions expressed by Lord *Denman* and Mr. Justice *Littledale*, in the case of *Sutton v. Tatham*, although it is not necessary to determine the same point here, as there was sufficient evidence to shew that the defendant knew the usage of the Stock Exchange at Liverpool, if it were requisite to prove it in order to make him liable. I am therefore of opinion that this rule ought to be made absolute.

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ALDERSON, B.—I am of the same opinion. It is clear, that if the plaintiff were guaranteed by the defendant, and paid the money, an action for money paid would lie. A person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place, must be taken as intending that the contract may be made according to the usage of that place. In the present case it is the custom at Liverpool for brokers to be guaranteed by their principals.

ROLFE, B.—I took a different view of this case at the trial, as I understood it was entirely governed by a case which had been tried before my brother *Alderson*, at York. But I think it did not appear there that there was any evidence of any usage, or whether the parties knew of it or not. Undoubtedly that would make a difference. If there were no evidence of such a usage, and the broker paid the money, the plaintiff could not be made liable for such payment unless by an express contract. The dealing here was at a particular place—the course of dealing was known. It may be, indeed, that it is not material whether the course of dealing was known to the parties. In *Sutton v. Tatham* the defendants did know of the usage. I express my con-

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currence with the dicta of Lord *Denman* and Mr. Justice *Littledale* in that case.

POLLOCK, C. B.—I abstain from giving any opinion, as I was absent when this case was argued; but I fully agree in the principles which have been laid down by the Court.

Rule absolute.



Nov. 18.

GOUDY v. DUNCOMBE.

The privilege of a member of Parliament from arrest on a ca. sa. exists for forty days before and forty days after a meeting of Parliament. The rule of privilege is the same in the case of a dissolution as in that of a prorogation.

IN this case, the defendant had been taken in execution for default in payment of a debt secured by a judge's order, and had been discharged from custody by an order of *Williams, J.*

The arrest took place on the 2nd of September, 1847. On the 3rd a summons was taken out for the defendant's discharge, on the ground that he was privileged from arrest. It appeared that, on the 28th of the preceding July, he had been elected a member of Parliament for the borough of Finsbury. On the 23rd of that month the Commons House of Parliament was dissolved, and writs were issued, returnable on the 21st of September, for a fresh election. On the 13th of August there appeared in the London Gazette an order of the Queen in council, by which Parliament was prorogued to the 12th of October. The order of *Williams, J.*, discharging the defendant from custody, was made on the 7th of September.

Willes moved to rescind this order (Nov. 11th).—The order for the discharge of the defendant ought to be rescinded, as he was not privileged from arrest when he was taken in execution. It is a popular notion that a member of Parliament is privileged from arrest for forty days before

and forty days after the meeting of Parliament. There is no proper foundation for this opinion, for the question has never been settled. It was discussed in *Butcher v. Stewart* (a), where the argument is given in the report of the case, but there was no decision upon the point. Mr. Gurney, in the course of his argument, says, "In Jenkins's Centuries (b), it is said expressly that the privilege of members of Parliament extends to forty days before the Parliament, and forty days after, for which is cited 2 Ed. 4, s. 8." On reference to the case in the Year Book, it appears that there is not any authority for the position that the privilege extends to forty days; and indeed the case has rather a contrary aspect. In Bacon's Abridgment, tit. "Privilege," C. 4, with respect to the time and exact continuance of this privilege, it is said that "it seems in good measure unsettled even at this day. It is, indeed, agreed in most books, that members of Parliament have privilege *eundo, morando, et redeundo*; and that they are entitled to privilege as well after a dissolution as a prorogation of the Parliament. By two orders of the House of Lords, one dated the 28th of May, 1624, the other the 26th of January, 1628, it is declared that their privilege commences from the teste of their writ of summons to Parliament; and that upon every session and prorogation, their privilege is for twenty days before and twenty days after each session, which one of the orders says is time enough for them to come from all parts of the realm, and to return: but the Commons never assented to this, for they claim forty days before and after each session." The time appears not to be a definite and fixed time, but a convenient and reasonable time, during which a member of Parliament is entitled to freedom from arrest before and after each session. Now, the time from the 7th to the 21st of September must be much more than a reasonable time for a member to repair from any part of the empire to his duties in Parliament.

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(a) 11 M. & W. 86.

(b) Fo. 118, Case 35.

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The case of Mr. Martin, which is to be found in D'Ewes's Journal, p. 410, and occurred in 1586, seems a reasonable and intelligible one. The question was put, whether the House would limit a time certain, or a reasonable time, to any member for his privilege. The House answered, a *convenient* time. That is an express decision of the House of Commons itself, and should therefore be, it is submitted, decisive of the question. The cases upon this subject are collected in May's book on the Law of Parliament, and he says, at p. 94, "With regard to the members of the House of Commons, the time of privilege has been repeatedly mentioned in statutes, but never explained;" and again in the following page he says, "But as the Commons are the judges of their own privileges, some precedents are required to shew that they really claim so long a duration of this immunity; and no such precedents are to be found. By the original law of Parliament, privilege extended to the protection of members and their servants, '*eundo, morando, et exinde redeundo*:' but Parliament has never yet determined what time shall be considered convenient for this purpose; and Prynne expresses an opinion, that no such definite extent of privilege is claimable by the law of Parliament (*a*). It has, however, always been the general belief that privilege extended to forty days, and several acts of the Irish Parliament have defined that time (*b*). But the following precedents by no means establish this extent of privilege to be either the law or the practice in England, and leave the matter altogether in doubt." The period of twenty days is unknown to the law in any case but the present. Mr. Sheridan was arrested for a debt shortly after a dissolution of Parliament: the debt was paid, and no question was raised as to the validity of the arrest. The arrest was made on the authority of an opinion of Mr. Justice Bayley, who

(*a*) 4 Prynne, Reg. 1216.

(*b*) See 3 Edw. 4, c. 1, Ir.; 6 Ann. c. 3, Ir.; 1 Geo. 2, c. 8, s. 2, Ir.

thought that the time was not a definite time, but a reasonable one.

In the next place, this privilege does not exist where there is a new meeting of Parliament after a dissolution. In *Sir Richard Temple's case* (a), a trial at bar in which he was defendant having been appointed for a certain day, he moved the Court to put off the trial, upon the ground of his being elected a burgess to serve in the next Parliament, which was to meet in eight days, and therefore prayed his privilege. But the Court refused the motion, because the trial was to come on before the day on which the Parliament were to meet. [*Alderson*, B.—That was an action, and the case is different.] The privilege is the same as that which is allowed to counsel and witnesses attending a court of justice. The question of what is a reasonable and convenient time is to be decided by the House of Commons, and if the defendant were to make his application there, the answer would be that it exists for a convenient time.

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Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a motion to set aside an order of my brother *Williams*, discharging the defendant (who had been taken in execution on a ca. sa.) out of custody, on the ground of privilege of Parliament.

We took time to consider whether we should grant a rule to shew cause, in order to have an opportunity of referring to the authorities cited by Mr. *Willes*. We are of opinion that the order was right, and consequently there ought to be no rule.

The date of the order was 7th September, the summons on which it was made having issued on the 3rd, and the

(a) 1 Sid. 42.

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prorogation of Parliament was to the 21st: the interval was less than twenty days.

It was contended by Mr. *Willes*, that the privilege of a member to be free from arrest was not for any certain time before or after the meeting of Parliament, but for a *convenient* time, and that at the present day the time in question was more than a convenient time. It was further contended, that the privilege was not applicable to the meeting of a new Parliament after a dissolution. In the first place, we think there is no foundation for the latter point: whatever privilege (necessary to secure their attendance) may belong to members of Parliament, between a prorogation and the next meeting of Parliament, we think must belong to them before they assemble, upon a summons after a dissolution. Whatever reasons apply to the one case equally apply to the other, and we think the law or rule of privilege must be the same in both. The question then is, what is the privilege of Parliament with reference to freedom from arrest?

In Blackstone's Commentaries (a), it is said that, in the case of a commoner, this privilege from arrest extends to forty days after every prorogation, and forty days before the next appointed meeting. In Bacon's Abr., tit. "Privilege," 4, the authorities are collected. It appears that in an old Irish statute, 3 Edw. 4, c. 1, the privilege is expressly limited to forty days before and forty days after the meeting of Parliament. In the case of *The Earl of Athol v. The Earl of Derby* (b), (cited by Blackstone), and which occurred in the 24th Car. 2, A. D. 1672, it is stated, that the Commons claimed forty days before and forty days after each session. In Jenkins' Book (c) it is said that the privilege extends to forty days before the Parliament and forty days after.

Mr. *Willes* contended, that the period was not a definite, but a convenient period. It may be that the rule was ori-

(a) Vol. 1, p. 165.

(b) 2 Lev. 72.

(c) Published 1661; 3rd Century, case 35, p. 118.

ginally during a convenient period, and the case cited from D'Ewes's Journal (which is given at large in Bacon's Abridgment) has some tendency to support this view; but it is consistent with this, that for some centuries the period of forty days has been deemed a convenient period. The House of Commons (as might be expected) determined only the question before them, and did not define the limit of convenience, but held twenty days to be within it. The 12 and 13 Will. 3 c. 3, more than once mentions "the time of privilege," but does not mention the duration of it; but the 4 Geo. 3, c. 24, s. 1, which first regulated the privilege of franking, limits that privilege to the session of Parliament and forty days before and forty days after any summons or prorogation. The same provision is to be found in the 24 Geo. 3, c. 7, s. 7, and the privilege so limited was continued by several statutes, (one of which was passed since the Union), till the privilege of franking was abolished.

We think that the conclusion to be drawn from all that is to be found in the books on the subject is this:—that whether the rule was originally for a convenient time, or for a time certain, the period of forty days before and after the meeting of Parliament has, for about two centuries at least, been considered either a convenient time or the actual time to be allowed. Such has been the usage—the universally prevailing opinion on the subject; and such we think is the law. If any change is necessary or desirable, we are not competent to make it.

Rule refused.

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PONTIFEX and Another v. DE MALTZOFF.

An affidavit to hold to bail, which states that the defendant "before and at the time of the commencement of this suit was, and still is, justly and truly indebted to the deponent in 100*l.* for work done, and materials for the same provided, and goods manufactured and made by the deponent for the defendant, and at his request," is bad.

HOGGINS had obtained a rule, calling on the plaintiff to shew cause why an order of *Platt*, B., for holding the defendant to bail, should not be rescinded, on the ground that the following affidavit, upon which the order was made, was insufficient. The affidavit stated, that "Sergius de Maltzoff, the defendant in this action, before and at the time of the commencement of this action, was and still is justly and truly indebted to the deponent and Edward Pontifex, his partner in trade, in £100, for work done and materials for the same provided, and goods manufactured and made, by the deponent and his said partner, for the said Sergius de Maltzoff, and at his request."

Martin now shewed cause.—The objection raised to this affidavit is, that there is no precise statement of a debt due to the plaintiffs, since it does not appear that the goods were delivered. It is submitted, however, that the affidavit is sufficient; when goods are made to order, they cannot be sold to other persons for the price at which they were ordered; and the affidavit states that the defendant is indebted to the plaintiffs. [*Pollock*, C. B.—It is to be presumed that goods are worth the cost of the labour expended upon them.]

Hoggins, contra, was not called upon.

PARKE, B.—The affidavit is indefinite. It is consistent with it that there is not any right to arrest the defendant. *Non constat* that any property passed in the goods; the defendant may not have accepted them. The contract may be executory. An affidavit which states that a party is indebted for goods bargained and sold, without stating that they are delivered, is not sufficient; and that case is the most favourable one which can be put for the plaintiffs.

The rule must be absolute to discharge the defendant out of custody. The bail bond to stand as a justification for the sheriff.

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POLLOCK, C. B., ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

PEGLER and Another v. HISLOP.

Nov. 22.

IN this case, *Williams, J.*, had made an order to arrest the defendant, under the statute 1 & 2 Vict. c. 110, upon an affidavit that the defendant was indebted to the plaintiffs in a certain sum for goods sold and delivered to the defendant in Spain, and that the deponent believed that the defendant was about to leave England. The defendant was accordingly arrested upon a ca. sa., and gave a bail bond to the sheriff.

It is allowable, under 1 & 2 Vict. c. 110, ss. 3 & 6, where the defendant appeals to the Court against an order to hold to bail, to use affidavits in denial of the plaintiff's cause of action. But the Court will not interfere unless it plainly appear that the plaintiff has no cause of action against the defendant.

Pashley, in the present term, obtained a rule, calling on the plaintiffs to shew cause why this order should not be rescinded, and why the bail bond should not be delivered up to be cancelled. The affidavits in support of the rule denied the existence of the debt, and also that the defendant was about to quit England for a period of two months.

Martin and *Ball* now shewed cause.—The only question is as to the intention of the defendant to quit England. The plaintiffs are prepared with affidavits to contradict those of the defendant, which deny the existence of the debt; but it is submitted that the Court will not, at the present stage, enter into the merits of the cause of action. [*Parke, B.*—The act does not exclude questions of that nature.] Under the old law, the merits of an arrest on mesne process could

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not be gone into: *Brackenbury v. Needham* (a). It is the cause of long affidavits. This is a very important point of practice. [*Parke, B.*—I think the words of the statute leave the whole matter at large. Under the statute 12 Geo. 1, c. 29, the plaintiff had a right to arrest the defendant on one condition only, that he made an affidavit of the cause of action; and that affidavit could not be contradicted. But the statute 1 & 2 Vict. c. 110, differs from that very materially; for, by the third section, the plaintiff is bound by affidavit to shew to the satisfaction of a judge, “that he has a cause of action against the defendant to the amount of £20 or upwards, and that there is probable cause for believing that he is about to quit England;” and the sixth section allows any defendant to appeal to a court against the order of a judge for holding him to bail. The whole matter is therefore left at large by the wording of the statute, and the defendant is not precluded from disputing, at this stage of the proceedings, either the cause of action or other matters which the plaintiff’s affidavits contain. Acting upon this view at chambers, I have relieved parties where the debt was barred by the Statute of Limitations. It must, however, be a very clear case that the plaintiff had no cause of action, or we should not interfere. *Alderson, B.*—In the *Duke de Palmella’s* case, which was under the 12 Geo. 1, c. 29, the Court entertained the question whether there was any fair ground for maintaining the action; and it surely is competent for us to try it.]

The whole case was then gone into. It appeared from the affidavits, that the defendant was the master and supercargo of a steam vessel called “*The Falcon*,” which plied between England and Oporto; and that, according to the defendant’s affidavit, it was not his intention to leave England for two months. It also appeared that the plaintiffs intended

(a) 1 Dowl. P. C. 439.

to take out a commission to examine witnesses abroad; and that they could not obtain final judgment in that time. [*Alderson*, B.—When we granted the rule in this case, we thought that judgment might be obtained.] The arrest was proper, as is shewn by the cases of *Larchin v. Willan* (a), and *Atkinson v. Blake* (b).

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Pashley, in support of the rule, contended that the arrest was premature, and that there were no true grounds for it, as the defendant had no intention of going immediately abroad.

PER CURIAM (c).—The arrest was premature. The judge's order and *capias* ought to stand, but the bail bond must be cancelled; the defendant's costs of the present proceeding to be costs in the cause.

Rule accordingly.

(a) 1 M. & W. 351.

(b) 1 Dowl. P. C., N. S., 849.

(c) *Pollock*, C. B., *Parke*, B.,
Alderson, B., and *Rolfe*, B.

SAMUEL v. BULLER.

Nov. 23.

THIS was a motion to set aside the execution of a writ of *ca. sa.*, and to discharge the defendant, who was in the gaol at Cambridge, out of custody. The affidavits stated, that on Saturday the 12th of June, 1847, the defendant received an order for his discharge from a Mr. Brown, at whose suit he was in custody. This order was forwarded on the same day to the undersheriff at Wisbeach. On Sunday the 13th the under-sheriff sent to the gaoler a

The defendant, who was in custody at Cambridge, received an order on a Saturday for his discharge: this was forwarded to the undersheriff at Wisbeach: on the next day, Sunday, the gaoler received a warrant of detainer

under a writ of *ca. sa.*, which had been issued the day before:—*Held*, that the sheriff was entitled to detain the defendant for a reasonable time after the receipt of the order, for the purpose of searching his office for writs, and that the defendant was not entitled to his discharge under 29 Car. 2, c. 27, s. 6, on the ground that the service of the warrant on Sunday was void.

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warrant to detain the defendant, under a writ of *capias ad satisfaciendum*, which had been issued the day before.

Pashley, in support of the motion.—The warrant of detainer in the present case was void, and the defendant is entitled to be discharged out of custody. The words of the statute 29 Car. 2, c. 7, s. 6, are plain: they provide that “no person or persons upon the Lord’s Day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment or decree (except in cases of treason, felony, or breach of the peace); but that the service of every such writ, process, order, warrant, judgment, shall be void to all intents and purposes whatsoever.” A *fi. fa.* binds the goods of a debtor from the time of the delivery of it to the sheriff: *Harris v. Loyd* (a), *Woodland v. Fuller* (b); and Mr. Baron *Platt*, before whom this motion was first made, refused to interfere, and referred the matter to the full court, as he thought the cases were analogous. [*Parke, B.*—This is not a service or execution of process. The sheriff has a right to detain the defendant a reasonable time for the purpose of searching the office, to ascertain whether any other writs are lodged against him.] The statute contains the word “*warrant*.” The defendant was detained in custody under a warrant which was lodged on Sunday.

PARKE, B.—The defendant is clearly not entitled to be discharged; a man is not to be released from custody if there is another writ against him. Here the warrant came on Sunday from the sheriff, the *ca. sa.* having been lodged with him on the Saturday before. The defendant was in custody on Saturday, and the sheriff was entitled to a reasonable time to search his office, to ascertain whether other writs were lodged against him. The sheriff did not live at Cambridge, and being responsible for the safe custody

(a) 5 M. & W. 432.

(b) 11 Ad. & Ell. 859.

of the defendant, he was entitled to a reasonable time, and which did not expire on Sunday, and therefore the defendant was not entitled to his discharge until Monday, by which day another writ is lodged with the sheriff. If he had released the defendant afterwards, he would have been responsible.

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POLLOCK, C. B., ALDERSON, B., and ROLFE, B., concurred.

Motion refused.

In Re LAWS, and the Principal Officers of Her Majesty's Ordinance.

Nov. 25.

IN this case the value of certain land of Mr. Laws, situated in the county of Pembroke, had been assessed by a jury under the provisions of the statute 5 & 6 Vict. c. 94. At the trial it was proposed by Sir *F. Kelly*, on the part of the claimant, to give evidence of certain expenses which had been incurred in surveying the land, and in bringing the question before the jury. This evidence was objected to by the *Attorney-General* on behalf of the Crown, on the ground that there was no provision in the act which gave these expenses and costs. The evidence was rejected.

A person, whose land has been valued by a jury, and sold, under the provisions of the National Defence Act (5 & 6 Vict. c. 94), is not entitled to the expenses and costs which he has necessarily incurred in bringing the matter to trial. The words of the 19th section, "compensation for the absolute purchase of the land," are not *per se* sufficiently comprehensive to include such expenses and costs.

Sir *F. Kelly* having obtained a rule calling on the defendants to shew cause why the several proceedings in this matter, and the verdict of the jury returned into this Court, should not be set aside, and why a writ for a new inquiry should not be issued,

The *Attorney-General* and *Rowe* now shewed cause.—
 This question turns upon the construction to be put upon

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the National Defence Act, 5 & 6 Vict. c. 94; and the question is simply this:—In addition to the amount found by the jury as compensation for the land which is the subject of inquiry, are they at liberty to give the expenses and costs incurred in proving and obtaining that compensation? It is contended that they are not. This act is *unlike* acts *in pari materiâ*. In the Lands Clauses Consolidation Act (a), and in several railway acts, costs are specifically provided for: but this act is silent on the subject of costs. By the 19th section the principal officers of her Majesty's Ordnance are empowered to contract for the purchase of any land they may require; and if such principal officers and the owner do not agree, then it shall be lawful for such principal officers to apply to two or more justices of the peace &c., to put them in possession of the land; and a jury is also to be summoned, who "shall find the *compensation* to be paid, either for the absolute purchase of such lands, buildings, or other hereditaments, or for the possession or use thereof." It is contended that, upon the proper construction of this section, by the term "*compensation*" is intended the mere value of the land taken, and that anything which may have been incurred for the purpose of selling the land cannot form any element in the amount to be awarded by the jury. It may be that such a construction imposes a hardship upon a party who is compelled to part with his land. It may be that the expenses incurred for the purpose of obtaining the compensation exceed the value of the land itself. This may be so, but by other sections of the act it appears that the legislature by this term intended this construction. It may be admitted that the word *compensation*, being larger than "*value*," is for the purpose of embracing cases of severance. The true meaning of this word may be gathered from the act itself. How is the purchase-money provided for in particular cases? Sup-

(a) 8 & 9 Vict. c. 18.

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pose A. to be tenant for life with remainder to B., and that the money to be paid into the Court of Exchequer (as is provided by the 21st section) to abide the direction of the Court, and to be subject to the interests of both parties. It would be unfair to A. that B. should participate in a share of that portion of the amount paid into the Court of Exchequer, which had been awarded for the expenses incurred by A. in obtaining the compensation. If it had been intended that the expenses should be paid, it would have been provided in the act that so much was for expenses, and so much for land. [*Alderson, B.*—In *Ex parte Pasmore (a)*, which was a case under the London Bridge Act, I held that a tenant for life of lands sold under the provisions of that act was not entitled to his costs out of the fund arising from the sale; and I there said, after observing that the 30th section was the one which gave me jurisdiction:—"That section enacts that the money agreed or awarded to be paid for the tenements to be purchased by virtue of this act shall, under the circumstances therein mentioned, be paid into this court; and that upon petition to this Court the money so paid shall be applied, under its direction, in the discharge 'of any debt or debts, or such other incumbrances,' as the Court shall authorise to be paid, affecting the same tenements. Here the word 'debts' means debts for which the estate is pledged; the word 'incumbrances' means incumbrances on the estate itself. The act then goes on to say, that, where such money shall not be so applied, the same shall be laid out under the like directions of the Court, in the purchase of other tenements, to be conveyed to the same or the like uses to which the original tenements stood limited, and that in the meantime 'the said money' shall be invested in the funds. I think, therefore, 'the said money' means the money agreed or awarded to be paid, as mentioned in the beginning of this sec-

(a) 1 You. & Coll. 75.

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tion. Then I find no power given to the Court, if the parties disagree, to settle the amount of the money to be so invested, and no power given to a jury to give compensation for expenses, such as that now claimed between the tenant for life and others interested in remainder." I there said I regretted the defect in the act of Parliament.] That case is in point against this application. In the 22nd section there is an express provision with respect to costs, where a fresh inquiry is granted: there the Court may require the party to give security for costs. The subject of costs was therefore in the contemplation of the legislature. The rule that the Crown neither pays nor receives costs may be also used as an argument here, unless there be an express provision by which they are given. There are also other acts *in pari materiâ* with this, which contain words of a very large and comprehensive nature, and yet in them there is a distinct provision for costs. In the 53 Geo. 3, c. 121, s. 22, the words "recompense and satisfaction" are to be found, and yet in the 25th section provision is made for "all the reasonable costs, charges and expenses of causing and in procuring such recompense, compensation, or satisfaction." These latter words were, therefore, not considered to be sufficient to include costs. And in 7 Geo. 4, c. 77, there is a similar instance, which shews that the legislature did not intend the word compensation to include costs. It may lastly be observed, that there is a broad difference between acts of Parliament upon matters relating to the defence of the realm, and those of a *quasi* private nature. This act is very similar to the 44 Geo. 3, c. 95. All these acts are silent upon the subject of costs, because the Crown is called upon to exercise a very high prerogative. Costs are altogether the creation of statute law.—They also referred to the statutes 20 Geo. 3, c. 38; 21 Geo. 3, c. 10, and 44 Geo. 3, cc. 55, 95.

Sir *F. Kelly* and *Montague Smith*, *contrâ*.—It is admitted

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that the rights of the claimant depend upon the fair, equitable and reasonable construction to be put upon this act of Parliament. It is not suggested that the Court should insert words in the act, but that they should put such a liberal construction upon it as may meet the justice of the case; no doubt, if the language of the act be not sufficiently large to comprehend the costs and expenses, this rule must be discharged. The words, however, are very large and comprehensive, as much so as could be used; they are "*compensation for the purchase of the property*," and not the *price or value* of the property. Can a person be said to have received compensation for the loss of the property of which he has been deprived by the Crown, if he has not received those expenses to which he has been necessarily put? Take the case of a trustee, who is bound not to part with the property for less than it is really worth, and whose duty it is to refuse an offer for the property which the Crown may make, when he knows that that is less than it is really worth. One head of compensation is the marketable value of the actual land taken; another arises from damage done by severance, as by taking the land from the middle of an estate. The latter of these has nothing to do with the value of the land. It is impossible to say that a person is compensated for the loss of his land, unless he also receives an equivalent for the amount of damage done; unless, therefore, a person is to sacrifice his property for much less than its real value, he must bring the matter before a jury. This step is as necessary as it would be for him to build a wall, if the effect of taking the property were to cut his house in two and leave him one half of it, the other being taken by the Crown. Now in the case supposed, the expense to which the owner would be put has nothing to do with the value of the property taken, but flows as a necessary consequence from the taking of it. In cases of appeal under this act, two of which only need be adverted to, viz. where the owner refuses the offer, or is unable to treat upon the

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matter on account of absence, the Crown may take the land, and the jury are, upon appeal to them, to find compensation for the absolute purchase of the land. It would be a most grievous injustice if the party did not receive the expenses thus necessarily incurred. It has been contended that other acts, which have words equally large, expressly provide for costs; and that, as the present act is silent on that subject, costs are not given. In some of those acts which contain these words, there are also express provisions for cases of severance; and it is admitted that, although there is no such provision in the present act, the party is entitled to damage arising therefrom. It follows that each act must be construed by its own terms, and that the same meaning must not be given to the word "compensation" in this act, as it may have received in such other acts; the inference to be drawn from those acts is, that there the word "compensation" does not include damages arising from severance. Now the words here are "compensation for the absolute purchase of the land," and not "for the value." There is no difference between a case where expenses are necessarily incurred by injury done to the remaining part of the property by severance, and such as are incurred by the party in order to make the purchase complete. If a word in an act of Parliament is capable of two constructions, that should be put upon it which is most conformable with justice and reason. The 22nd section has been referred to as shewing that the legislature contemplated costs in the construction of this act; and if they had costs in contemplation, why did they not give them? They used words large and comprehensive enough to include them.

POLLOCK, C. B.—We are all of opinion that this rule must be discharged. It is a matter of regret that there is no provision in the act of Parliament for the expenses. The arguments of Sir *Fitzroy Kelly* and Mr. *Montague Smith*

seem to me to be directed rather to the expenses than to the costs. With respect to the mere costs of the trial, it appears to me to be obvious that they have been omitted, and that they are unprovided for by the statute; and I think it would be incompetent for the jury to take them into account. The stress of the argument, however, is in respect of the expenses. It is contended, that the expenses fairly and reasonably, and, in fact, necessarily incurred, to enable the party to receive an offer, and to take the necessary steps for the purpose of ascertaining the proper compensation, do in reality form part of that which the party is justly entitled to receive.

If this were the case of an action brought to obtain compensation by a person whose land had been taken possession of by the Crown, or by any private individual, it would be a different question. In such a case, first the value of the land, then the consequential injury, and, lastly, all the expense to which the party had been put in maintaining his action, might be taken into account. There are many cases of actions brought for injuries done, where evidence is given in the first instance of those expenses which have been necessarily incurred by the party for the purpose of putting himself in such a situation as to make his claim. An instance of this kind occurred some time ago in this Court. It was an action for an injury done to some mining property. The party was obliged to sink a shaft, in order to ascertain the extent of the injury. After the trial, and after the jury had given their verdict for damages, an application was made to this Court for the expenses of those persons who had been employed to go into the mines and make a survey, and who had afterwards been witnesses in the cause. The Court held, that the Master could not then grant those expenses; and that if they were the necessary consequence of the defendant's wrongful act, it was a question for the jury. The Court were of opinion that expenses of that description formed properly part of the general damages for the reco-

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very of which the action was brought, and should have been laid before the jury. In such a case the expenses would form part of the compensation, but the Court thought that they formed no part of what could be called the costs of the action. Here I think no costs can be recovered, as no mention is made of them in the act. I am also of opinion that the expenses cannot be recovered; because it appears to me that there is a broad distinction between the compensation to be paid, and the means of ascertaining what that compensation should be.

It may, perhaps, be some satisfaction to know, that undoubtedly it is competent for the jury, when they are considering the value of the land, to take into their consideration the character of the compulsory sale. In practice such is the case. It is always the custom with surveyors to make a difference in their estimates between the value of land to be sold in the market, and of that which is to be subject to what is called a compulsory sale. Whatever may be the justice of the case before us, we must adhere to the words of this act of Parliament. I regret that I am compelled to give it as my opinion, that the compensation mentioned in the act means a compensation for the absolute purchase of the land, that it includes everything which ought to be given to the party in respect of the land itself, and of any damage resulting from severance, or from its particular situation; but that it does not include the expenses to which the party may be put in respect of the purchase. Those expenses are matters for which the legislature have not provided, and by their direction we must abide. I am, therefore, of opinion that this rule must be discharged. If the parties are aggrieved, as they certainly seem to be, they must seek redress, either by appealing directly to the Crown, or to that department in which the matter is, or to the legislature to amend this act.

ALDERSON, B.—I am of the same opinion. What is given

by the act of Parliament (by the words of which we are bound) is the compensation for the absolute purchase of the land. In looking through the act, we see that it is not confined to persons who have the fee simple in themselves, but that it is extended to cases where the title is divided into a variety of interests, immediate and reversionary. Every one of these interests is to have its compensation, in proportion to the original amount found for the absolute purchase of the whole. If a person be tenant for years, at will, for life, or in remainder, he is tenant for years, at will, for life, or in remainder, of an estate which is of the absolute value of so much as the jury shall find. This interest is to be settled by the Court of Exchequer, into which the money (if necessary) is to be paid; and it is to be paid to him out of that *corpus* so ascertained. How can the legislature have contemplated such a case as this, that into that *corpus* so ascertained are to be put the expenses which have been incurred by one of the parties, for the purpose of ascertaining the proper amount of compensation? The other parties are not interested in these expenses; they incur no loss on that account. It would, therefore, be gross injustice to put such a construction on this act of Parliament, as thereby to give parties who have a title in reversion a share out of the costs and expenses incurred by the previous party who has fought the battle for them. I therefore say, that it is not probable that the legislature intended such a result. It is not probable that the legislature, in the words "compensation for the absolute purchase," would look to anything more than that for which compensation might justly be given, as being the material out of which these different interests might be carved in degrees justly and equally proportioned to such interests. The real value of the particular property being ascertained, the tenant for life is to have an interest in the money so given, as to the compensation equivalent to his life interest; and so with respect to the tenant for years or in remainder, each party is to have the same interest in the

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money as he previously had in the land. The one is a substitute for the other.

It is very true that the tenant for the time being is the person who has, in the first instance, to incur all the expense in ascertaining how much the compensation is to be; and it is, no doubt, very hard that the party who first fights the battle should be unable to take from the *body* of the money awarded his costs and expenses. It has, however, been decided over and over again that he cannot. It appears, therefore, as he cannot do so, that the *body* given is simply as a compensation for the land taken; the money is to go as the land would go, and to the same persons; in short, the money is substituted for the land. I therefore cannot think that the legislature intended to add to that *corpus*, which is to be disposed of in such a manner, the money which belongs to the party who contests the case. It would have been justice had the legislature provided that the costs should be paid to that party who contests the matter. Had there been a provision of that description, the party who had incurred costs would have recovered them, and the other parties would also, as is right, have had the compensation for the land. The act of Parliament, however, is silent upon this subject; and I am extremely sorry that such is the case, as it appears to me to be very unjust. I cannot, however, alter an act of Parliament merely because I may be of opinion that it is unjust.

ROLFE, B.—I concur with the rest of the Court; and in no part of the judgment more than in that part of it in which regret has been expressed that we are obliged to arrive at such a conclusion as we do. I must say that I feel it to be a great grievance, that a party should have his property taken from him without being able to recover repayment of those expenses which have been necessarily incurred, or reasonably incurred by him previously to the loss of his estate. In my opinion, however, we have no power under this act of Parliament to give them. The omission of such

a provision may have been made either advisedly, or per incuriam. There may be great weight in what has been urged by Mr. *Rowe*, namely, that this omission in the act was intentional; inasmuch as acts of this description are not passed for the mere accommodation of public or private interests, as in the case of roads, but for the actual defence of the state. It may be that it was the opinion of the legislature that the expense to which a party is put upon such a subject is a *damnum absque injuriâ*. I do not, however, see much reason in that argument; because, if it were so, a party might be deprived of his land altogether, without receiving in return any compensation whatever. I am rather inclined to think, that the omission in this statute of the ordinary clause which gives to the party the costs he has incurred, was the result of inadvertence. There is no clause of that description here. The contest has been, that although there is no such clause, yet these expenses may impliedly be taken to be included in the sum that the jury are to give as "compensation for the absolute purchase of the land." The real question, therefore, is this: Suppose the jury to be assembled, under the presidency of a judge, what direction should he give to them as to the amount of compensation to be awarded by them? Ought the learned judge to say to the jury, "In estimating that compensation, you may take into account the expenses which the owner of the property has incurred in getting it surveyed, and in making proper preparations for the investigation, the expenses of the witnesses and the counsels' fees, and other necessary expenses?" I think that such a direction would be clearly incorrect. Upon looking at this statute, its intention is, that the jury are to give that which is to be considered as an exact equivalent for the property as it stood before anything was taken. I am led to this conclusion by the language of the 25th and 26th sections, which enact, that in all cases where property so taken is that of persons under disabilities, the money is to be paid into the

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Court of Exchequer, and then, sooner or later, subject to certain directions there given, it is to be laid out in the purchase of other lands, subject to the same uses as the lands taken. That is the whole of the compensation. The meaning of the words to which Mr. *Montague Smith* directed our attention, "or otherwise to dispose of it," and so on, "in such way as shall be just," is, that there shall be the power to order a portion of that money to be paid in discharge of an incumbrance, or in such a way as to be an exact equivalent to an investment in lands. In all these cases, it is perfectly obvious that there would be the same hardship as exists in the present case. The person who has incurred the costs would not recover them, but would merely get the interest of the money laid out, and which is given by way of compensation. On the other hand, there would be an improper gain to the tenants in remainder; because they would not only receive an equivalent for the land taken, but they would, in addition, get other lands, purchased with the money awarded for costs incurred by the tenant for life. In either case there would be injustice. I come, therefore, to the conclusion, that the jury should be directed to follow the precise words of the act, which are, that they shall give such a sum as shall be a compensation for the purchase of the land. The 21st section is not unimportant; in that section provision is made that a proportion of the money paid into the Court shall go to parties who have the estates of tenants at will, &c., in the property taken. The tenants at will have incurred no proportion of the costs; it would, therefore, be unjust to give them any proportion of the money so paid in respect of the costs. The view of this act which I thus take is materially fortified by the consideration of the statutes which have been adverted to by the *Attorney-General*. The statutes for the improvement of the metropolis and the management of the revenue, &c., are in *pari materiâ*, and contain similar clauses for the summoning of juries, the taking of lands, and the paying

of money into court to be invested. All these statutes, although the words are more comprehensive than the words in the present statute, (for the expressions there are "compensation," "satisfaction," &c.), contain distinct clauses for costs. That shews that the legislature did not consider them to be included under the word *compensation*. I regret, therefore, to say, that I concur in the opinion of the rest of the Court, that this rule must be discharged.

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Rule discharged.

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Nov. 2.

BALL moved to strike an attorney off the rolls of this Court for alleged misconduct.—A rule has been already granted in the Court of Common Pleas against this person, who is an attorney of this Court, and the application is made upon the production of a similar rule. [*Alderson*, B.—This is the last day of term; he ought to have an opportunity of denying that he is the same person.]

An application to strike an attorney off the rolls of the Court, will not be granted upon the mere production of a similar rule obtained in another Court, unless there be an affidavit that he is the same person, and the application should not be made on the last day of term.

POLLOCK, C. B.—We cannot grant you a rule, as you have no affidavit that he is the same person as the one against whom the Court of Common Pleas have granted a rule. This is the last day of term, and the matter would hang over his head during the whole of the vacation. The motion should be made so as to give him an opportunity of answering it promptly.

ALDERSON, B., **ROLFE**, B., concurred.

Rule refused.

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Nov. 6.

JONES v. ROBINSON.

Assumpsit.—The declaration stated, that plaintiff and A. B. carried on business in copartnership, and in consideration that plaintiff and A. B. would sell defendant the business, and would become trustees for him in respect of all debts, &c. due to plaintiff and A. B. in respect thereof, defendant promised plaintiff to pay him all money he had advanced in respect of the copartnership, and for which it was accountable to plaintiff. Averment, that plaintiff and A. B. did sell the business to defendant, and that, at the time of the promise, plaintiff had advanced a certain sum. Breach, non-payment thereof:—Held, on motion in arrest of judgment, that it was not necessary to join A. B. as a co-plaintiff, and that the declaration was good.

ASSUMPSIT.—The first count of the declaration stated, that “whereas heretofore, to wit, on the 24th of March, 1847, before and at the time of making of the promise herein-after next mentioned, one William Dalton and the plaintiff carried on the business of ironmongers together in copartnership, and thereupon heretofore, to wit, on the day and year aforesaid, in consideration that he, the plaintiff, and the said William Dalton, would sell and assign to the defendant the said copartnership business and the stock-in-trade and effects to them as such copartners belonging, and would become trustees for the defendant in respect of all debts and rights due or belonging to them, the plaintiff and the said William Dalton, as such copartners, by assigning to the defendant all their, the plaintiff’s and the said William Dalton’s, beneficial interest in the said debts and rights, and would put the defendant in possession of the said business and stock in trade and effects, he, the defendant, promised the plaintiff to pay him, the plaintiff, all the money that he, the plaintiff, had advanced in respect of the said copartnership, and for which, at the time of the making of the said promise, the said copartnership was accountable to the plaintiff, and also promised the plaintiff and the said William Dalton, that he, the defendant, would discharge all the debts due from the plaintiff and the said William Dalton, as such copartners, and all liabilities to which they, the plaintiff and the said William Dalton, were subject as such copartners. And the plaintiff says, that he, the plaintiff, and the said William Dalton, relying on the said promise of the defendant, in a reasonable time in that behalf, afterwards, to wit, on the day and year aforesaid, did sell and assign to the defendant the said copartnership business and the stock-in-trade and effects to

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them as such co-partners belonging, such stock being of great value, to wit, of the value of £500, and became trustees for the defendant in respect of all debts and rights due or belonging to them, the said plaintiff and the said William Dalton as such co-partners, by their assigning to the defendant all their, the said plaintiff's and the said William Dalton's, beneficial interest in the said debts and rights, and put the defendant in possession of the said business and stock-in-trade and effects. And the plaintiff further says, that he, the plaintiff, had, at the time of the making of the said promise, advanced, in respect of the co-partnership, money amounting to a large sum, to wit, 112*l.* 1*s.* 11*d.*, for which money the said co-partnership was, at the time of the making of the said promise, accountable to the plaintiff; of all which, the defendant, after the making of the said promise, and before the commencement of this suit, to wit, on the day and year aforesaid, had due notice; and although a reasonable time for the defendant to pay to the plaintiff the said money which he, the plaintiff, had so advanced, and for which the said co-partnership was so accountable, elapsed after the defendant had such notice as aforesaid, and before the commencement of this suit, yet the defendant hath not paid the same, &c. The declaration contained also the common counts.

The plaintiff having obtained a verdict on the first count at the trial of the cause,

Martin now moved to arrest the judgment on that count. —The declaration discloses a party who should have been joined as a co-plaintiff. It is a general principle, in actions *ex contractu*, that all the parties from whom the consideration moves must be joined. This point was argued in *Lord Bentinck v. Connop (a)*, but the arguments are omit-

(a) 5 Q. B. 693.

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ted in the report of the case. Now, it is submitted that the consideration is the essential part of the contract, and the promise is nothing without it. On this broad principle, therefore, that where, on the face of the declaration, it appears that the consideration moved from any party, he should be made a party to the action. [*Parke*, B., referred to *Price v. Easton* (a), and *Crow v. Rogers* (b).] It is contended that Dalton should have sued in this action, upon this general principle, that he might have released the debt.

POLLOCK, C. B.—There will be no rule. No authority has been cited to support the defendant's argument.

PARKE, B.—It is true, that no stranger to the consideration can sue; but, in the present case, the separate interest of the plaintiff in the partnership fund is the consideration upon which the promise is founded; and this case does not fall within the rule for which the defendant contends.

ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

(a) 4 B. & Ad. 433.

(b) 1 Stra. 592.

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SMEETON and Another v. COLLIER.

Nov. 20.

IN this case a rule had been obtained, calling upon the defendants to shew cause why an order of *Platt*, B., should not be varied or rescinded.

It appeared from the affidavits, that in December, 1846, the plaintiffs had brought an action of *covenant* upon a mortgage-deed, which the defendant had given to secure the sum of £400 borrowed by him from the plaintiffs' testator. A judge's order had been obtained by the defendant to stay all the proceedings in this action, upon payment of principal, interest, and all expenses. These having been paid, the defendant made an application to have the mortgage-deed and title-deeds delivered up. This demand was refused, on the ground that the plaintiffs' attorney had a lien on them for work done for the defendant. On the 25th of February, an order was made at chambers by *Platt*, B., on an application by summons, to deliver to the defendant a certain mortgage-deed of the 6th of January, 1845, and all other deeds and writings relating thereto in the possession of the plaintiffs, the amount of the mortgage, interest, and expenses having been paid and satisfied by the defendant. It was to rescind or vary this order that the present rule was obtained.

An action of covenant on a mortgage-deed is within the 7 Geo. 2, c. 20, and under that statute a judge at chambers has power to make an order for the delivering up of the deed.

Where a statute, in general terms, and without any special limitation, either express or to be inferred from its terms, gives any power to one of the superior courts, that power may be exercised by judge at chambers as the delegate of the Court.

Whitehurst and *Flood* now shewed cause.—There are two questions in the present case. The first is, whether an action of *covenant* on a mortgage-deed is within the statute 7 Geo. 2, c. 20 (a); and, secondly, whether a judge at

(a) The first section of which, after reciting that mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay the money secured by such mortgages, and for performing the covenants therein contained, and likewise commence suits in his Majesty's courts of equity to foreclose their mortgagors from redeeming their estates, and the courts of law where such ejectments are brought have not power to com-

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chambers had power to make this order. There can be no valid objection raised to this order upon either of these

pel such mortgagees to accept the principal monies and interest due on such mortgages and costs, or to stay such mortgagees from proceeding to judgment and execution in such actions; but such mortgagors must have recourse to a court of equity for that purpose, in which case likewise the courts of equity do not give relief until the hearing of the cause, for remedy thereof, and to obviate all objections relating to the same, it enacts, "That where any action shall be brought on any bond for payment of the money secured by such mortgage or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of his Majesty's courts of record at Westminster, or in the court of great sessions in Wales, or in any of the superior courts in the counties palatine of Chester, Lancaster, or Durham, by any mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of his Majesty's courts of equity in that part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements, or hereditaments, if the person or persons having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall appear and become defendant or

defendants in such action, shall, at any time pending such action, pay unto such mortgagee or mortgagees, or, in case of his, her, or their refusal, shall bring into court where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity, upon such mortgage (such money for principal, interest, and costs to be ascertained and computed by the Court where such action is or shall be depending, or by the proper officer by such Court to be appointed for that purpose), the monies so paid to such mortgagee or mortgagees, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall and may discharge every such mortgagor or defendant of and from the same accordingly, and shall and may, by rule or rules of the same court, compel such mortgagee or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender, or re-convey such mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee or mortgagees have or hath therein, and deliver up all deeds, evidences, and writings in his, her, or their custody relating to the title of such mortgaged lands, tenements, and hereditaments, unto such mortgagor or mortgagors who

grounds. An action of covenant is within the statute. It is clearly within the intention of the act. It would be strange to hold that an action on the covenant in a mortgage-deed is not within the terms of the statute, when the case of an action on "any bond for the payment of the money secured by a mortgage" is expressly provided for. This point, however, has been set at rest by two express decisions. The first is an anonymous case in Chitty's Reports (a); the second is that of *Dixon v. Wigram* (b); in both of which, such an action was held to be within the statute. There can be no difference, in point of fact, whether the action is brought upon a bond for the money secured by the mortgage, or upon the mortgage itself. The authorities are collected in 2 Roll. Abr. "Obligation," p. 146, and in Petersdorff's Abridgment, tit. "Bond," which may be cited to shew that the word "bond" is not to be taken merely as an obligation under seal for the payment of money.—They also cited *Sawyer v. Mawgridge* (c).

Secondly, a judge at chambers had power to make this order. A judge at chambers has all the authority which is given to the Court by a statute, unless there be something in the act to the contrary. The Court may delegate their authority to a judge without any express enactment for that purpose. The question, therefore, is reduced to this: whether there is anything in the statute which precludes the Court from delegating its authority? No inconvenience or injustice can arise from the delegation of this authority, as the order of the judge may be set aside or varied by the Court. Now the words of this act do not lead to the conclusion that the order must necessarily be made in court. [*Parke, B.*—Unless a distinction is made in a statute between the pow-

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shall have paid or brought such monies into the court, his, her, or their heirs, executors, administrators, or to such other person or persons as he, she, or they

shall for that purpose nominate or appoint."

(a) Vol. 2, p. 264.

(b) 2 Cr. & J. 613.

(c) 11 Mod. 218.

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ers of a judge and those of the Court, the judge has the same power as the Court. In 43 Geo. 3, c. 46, s. 2, which, after enacting that persons arrested on mesne process, instead of giving bail, may deposit with the sheriff a certain sum to be paid into court, the clause goes on to enact that, on the defendant's perfecting bail, the sum of money so deposited "shall, by order of the Court, upon motion to be made for that purpose, be repaid to such defendant." The language of that act shews that a judge at chambers has no authority in such a case. *Alderson, B.*—This point is perfectly clear.]

Martin and Mellor, contra.—An action of covenant on a mortgage-deed is not within this statute. The case in *Chitty* is no authority; it was merely a motion for a rule *nisi*, and the learned judge entertained doubts upon the point; for he said, "To grant this motion seems to be converting this court into a court of equity. However, the rule *nisi* will be granted, as cause may afterwards be shewn." The rule was made absolute merely because no opposition was offered. It is the better rule, as Mr. Baron *Parke* observed in *Becke v. Smith (a)*, in putting a construction upon a statute, to adhere to the grammatical interpretation of it, unless such a construction leads to a manifest absurdity or injustice. Here there is an evident distinction intended to be observed in the act between a bond and a mortgage-deed. The words should not be twisted into the construction which it is contended ought to be put upon them. The preamble of the act excludes an action of covenant on the mortgage-deed. [*Rolfe, B.*—Perhaps the word "bond" was introduced into the act *ex majori cautela*, for the purpose of including actions upon collateral securities.] There is only the single case of *Dixon v. Wigram* which can be taken as an authority against the defendant. The order is at all events bad,

(a) 2 M. & W. 195.

as a judge at chambers had no authority to make it. The Court cannot delegate the authority given by this statute. The statute says the mortgagee shall be compelled to deliver up the deeds, &c. by rule of court. It must therefore be done *in court*. The order of a judge at chambers and a rule of court are not identical. It is by this act alone that this power is given, and it is not right to travel out of the terms of it. *Jones v. Fitzaddam* (a), and *Shaw v. Roberts* (b), may be cited to shew that a judge at chambers has not the same power which the Court has. [*Alderson*, B.—The Interpleader Act, 1 & 2 Will. 4, c. 58, draws a distinction, in the first and sixth sections, between the power of the Court and of a judge at chambers. By the first section it says, that “it shall be lawful for the Court or any judge thereof to make rules” of interpleader; and, by the sixth section, that “it shall be lawful to and for the Court” to call the parties before them by rule of court. *Pollock*, C. B.—*Jones v. Fitzaddam* was decided under the 48 Geo. 3, c. 123, by which the application for the discharge of a defendant who had been in custody for more than twelve months for a sum under £20, is directed to be *to the Court in term time*.]

POLLOCK, C. B.—This rule must be discharged. The questions in the present case lie in an extremely narrow compass. Mr. *Martin* contends, in the first place, that, as this is an action of covenant, there is no power to interfere, the power given being confined to actions on bonds, and actions of ejectment; and, in the second place, that a judge at chambers had no power to make this order. I think that neither of these objections can be supported. As to the first point, namely, whether an action of covenant is within the statute, there is an express decision of more than fifteen years’ standing against Mr. *Martin’s* argument. That authority has been acted upon ever since. It is perfectly clear that an action of covenant is within the mischief con-

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(a) 1 Cr. & M. 865.

(b) 2 Dowl. P. C. 25.

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templated by the statute; and we should be putting a strained construction upon it by deciding otherwise. If there were any doubt the other way, that is removed by an express authority, which I do not think it is competent for us to overrule. The statute speaks of an action on a bond "for the performance of the covenants therein contained," but is silent as to an action of covenant on the mortgage-deed. The word "bond" is very large; it means an obligation to pay a sum of money. I am, therefore, of opinion that the present case is within the statute. Where the legislature simply gives a power to the Court, it is to be taken that the Court receives all the ordinary powers necessary for that purpose; and it is intended that the judge should exercise those powers. No distinction exists between powers conferred by statute, and those existing at common law, unless a distinction is to be gathered from the terms of the statute. Many statutes might be pointed out which contain this distinction. Where a motion is to be made in open court in *term time*, it may be urged that the legislature contemplated that such authority should be confined to the Court. This was so in the case of *Jones v. Fitzaddam*, which was cited for the plaintiffs. The view I have been disposed to take is this, that, where an authority is given to the Court by an act of Parliament, the Court may exercise that power in the same manner as it may exercise any other powers, unless there be something in the act itself which imports that the power is conferred with a special limitation. I think, therefore, that neither of the two points made on the part of the plaintiffs are good, and, therefore, that they are not entitled to succeed upon them. For these reasons, I am of opinion that this rule ought to be discharged.

PARKE, B.—I am of the same opinion. As to the first question, I should have somewhat hesitated, if I had been called upon, for the first time, to construe the stat. 7 Geo. 2, c. 20, so as to hold that it includes an action of covenant. The principle with regard to the construction

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of statutes, on which I have constantly acted, is well expressed in the able words of Mr. Justice *Burton*, in *Warburton v. Loveland* (a), and which I adopted in the case of *Becke v. Smith*, "that it is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless it is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further." Upon this principle, I should have hesitated to hold that the words of this statute embrace the case of an action of covenant on a mortgage-deed. We are, however, not called upon for the first time to put a construction upon this act of Parliament, and to decide whether or not an action of covenant is within it; for this question has already been decided by the case of *Dixon v. Wigram*, to which our attention has been called, and upon the authority of which I have frequently acted. The principle there laid down is a salutary one, and there is no reason to depart from it. I think, therefore, that upon that point the plaintiffs fail. The next question is, whether a judge at chambers has, under this statute, a power to make the order in question. In the construction of the act, we must hold that the Courts may exercise the power given to them by it in the common and ordinary way, unless it contain something to the contrary. When, therefore, a judge exercises the duties which belong to the Court, it is to be taken that he is to exercise them in the same manner as the Court itself, unless there is something in the context of the act which leads to a different conclusion. As, for example, in the 43 Geo. 3, c. 46, where the enactment is that the motion is to be made in open court, it is clear that the judge is not to have any power in the matter. Again, in the 48 Geo. 3, c. 123, it is enacted that the application

(a) 1 Hudson & Brooke's Irish Reports, 648.

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must be made in term time to one of the superior courts, which shews that the legislature intended that the power should be exercised by the Court, and not by the judge. So, in the Interpleader Act, the first section states that it shall be lawful for "the Court, or any judge thereof," to make rules or orders; but the sixth section enacts, that "the Court" shall have power to call the parties before them "by rule of court." This shews that the legislature contemplated a distinction between the powers to be exercised by the Court and the judge. By the application of this principle of construction to the present statute, upon which this question arises, it seems to me it is not limited to acts done in court, and therefore that my Brother *Platt* clearly had authority to make this order.

ALDERSON, B.—I quite agree with the rest of the Court. If this were the first time this matter had been discussed, I should require some time to give my opinion. I am almost inclined to agree that the construction for which the defendant contends might be put upon the words of the act. This question, however, is not a new one, but has already been decided by the authorities which have been quoted. The construction which the act has received has been acted upon for many years, and no doubt has been since raised upon it. I consider that we are bound by the authority of *Dixon v. Wigram*, which is in conformity with the real spirit and intention of the legislature. I am glad to find that such cases exist, which enable us to do substantial justice, by allowing defendants to get rid of actions brought against them upon the payment of all that is just to the plaintiffs. It would indeed be strange if the legislature, by permitting a plaintiff to shift the form of action from debt to covenant, had enabled him thereby to deprive the defendant of the benefit of the statute. I, however, consider myself bound by the authority of decided cases. As to the other point, I take it to be clear, that, where the legislature gives the Court any powers in general terms, and without any express limitation, it is

the same as if those powers were given by the common law. The legislature is aware of the powers the Court is accustomed to exercise; and when fresh powers are given by the legislature, they are to be exercised in the usual and ordinary way. When, therefore, special limitations are intended to be imposed, the legislature express themselves to that effect. Several statutes have been referred to, in which the legislature shew that they do not intend to give the same authority to the judge at chambers as they do to the Court in banc. Where, however, any power is given to the Court in the usual way, the Court may exercise it in the ordinary and usual way in which the Court is accustomed to exercise its powers.

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ROLFE, B.—I am of the same opinion; and I am glad that there is an authority upon which we can act in the present case. It is a matter of consideration which is entitled to great weight, that whatever observation may be made as to the view of Mr. Justice *Bayley*, in the case in *Chitty's Reports*, when the point came before the Court of Exchequer fourteen years afterwards, in *Dixon v. Wigram*, that learned judge treated the matter as clearly and without doubt to be within the statute. It would be extremely mischievous to call a point in question which has been settled and acted upon for so many years. I rejoice that we have an authority to act upon; and I think the principle of those decisions to be a correct and just one. I think that it is a great safeguard, in the interpretation of statutes, to observe the rule of construction which accords with their plain and obvious meaning, unless, as sometimes is the case, a word be inserted by mistake. Here the statute speaks of only one species of action, brought with reference to a mortgage. It says, "Where any action shall be brought on any *bond* for payment of the money secured by such mortgage, or performance of the covenants therein contained." Now the substantial object of the action is to secure the mortgage debt and interest. The words "or performance of the covenants

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therein contained," is an imperfect expression. It means "for enforcing the consideration therein contained." It seems to me that the words "on any bond" might be altogether rejected. If this matter had been *res integra*, I do not think that the defendant's argument would have been altogether hopeless; but this question has been decided; and I think we are bound to abide by the decision which has been acted upon for years. With respect to the other point, I agree with the rest of the Court in thinking the judge has power to make this order.

Rule discharged, with costs.

Nov. 20.

ORGILL v. BELL.

An order having been made on the 6th of July, 1846, by a judge at chambers, to set aside a *verdict* obtained under a writ of trial, on the ground of the insufficiency of the notice of trial;—*Held*, that the order was merely irregular, and not a nullity; and, therefore, that an application on the last day of Trinity Term, 1847, to rescind it was too late.

THIS was a rule calling upon the defendant to shew cause why an order of *Platt*, B., should not be rescinded. In this case a writ of trial had issued to try the cause before the under-sheriff of Middlesex. The notice of trial was given for a day when the Court tried only those causes which had been previously adjourned. The defendant's attorney attended at the trial merely for the purpose of objecting to the sufficiency of the notice of trial. The trial, however, proceeded, and the plaintiff had a verdict. This verdict, and all subsequent proceedings, were set aside by an order of *Platt*, B., on the 6th July, 1846. In Michaelmas Term, 1846, the defendant obtained a rule for judgment as in case of a nonsuit, which was discharged by the plaintiff, as no one appeared to support it. The present rule was obtained on the last day of last Trinity Term.

C. C. Jones, Serjt., now shewed cause.—It will be said that the learned judge had no power to set aside the *verdict*. The order, however, was, in substance, an order to stay the execution. A judge has power to order a writ of trial to issue, or to stay execution. The setting aside the verdict is a mere irregularity. The plaintiff should, there-

fore, have come within a reasonable time if he wishes to get the order set aside. [*Parke, B.*—If the making of this order was an improper exercise of jurisdiction, and the party who objects has not come in time, the order remains good.]

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Crouch, contra.—This order was a nullity, and not a mere excess of jurisdiction. If it be a nullity, the lapse of time makes no difference. In *Roberts v. Spurr (a)* it was held, that an interlocutory judgment signed without an appearance entered was a nullity.

POLLOCK, C. B.—This rule must be discharged with costs. The order in question was made on the 6th of July, 1846, and served on the opposite party. Instead of applying to have that order rescinded in the next Michaelmas Term, he waits until there is an application for judgment as in case of a nonsuit. He does not even then apply to the Court to set the order aside. This application is greatly too late; it ought to have been made in the first four days of Michaelmas Term last year.

ALDERSON, B.—I am of the same opinion. It is a mere irregularity. The order was erroneous, and, if the application had been made within a reasonable time, the order would have been set aside. The application should have been made in Michaelmas Term, 1846. There is no pretence for saying that this is a reasonable time.

ROLFE, B.—I am of the same opinion. This application should have been made within a reasonable time, and the Court would have set the order aside; but if the plaintiff choose to lie by for twelve months after the order is made, under such circumstances it ought to stand.

Rule discharged, with costs (*b*).

(*a*) 3 Dowl. P. C. 551.

(*b*) *Parke, B.*, had left the Court during the course of the argument.

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Nov. 25.

The Court will not permit a party to retain a verdict upon a record which has been improperly altered by him.

SUKER and Another v. NEALE.

THIS was a rule calling on the plaintiffs to shew cause why the record in the present action, and all subsequent proceedings, should not be set aside, with costs.

The declaration was upon a bill of exchange by the plaintiffs, as drawers, against the defendant as acceptor, payable *three* months after date. There were counts for goods sold and on an account stated. The issue delivered was upon the bill payable *three* months after date. At the trial before *Wilde*, C. J., at the last Summer Assizes, at Bristol, the bill produced appeared to be payable *two* months after date.

It was objected, for the defendant, that there was a variance between the bill produced and that declared upon, but it appeared that the record had the word *two*, which had been written on an erasure. The Lord Chief Justice said he could only try the issues as they appeared on the record. The plaintiffs had a verdict for the amount of the bill, with interest.

Hoggins now shewed cause.—The record has been altered after it was ingrossed by the plaintiffs' country agent. It is submitted that the plaintiffs are entitled to retain their verdict upon the account stated. [*Alderson*, B.—How can we permit you to hold a verdict upon a record improperly altered? The defendant may have a good defence to the count on the account stated.]

Ball, contra, was not called upon.

PER CURIAM (a).—The rule must be absolute.

Rule absolute.

(a) *Pollock*, C. B., *Alderson*, B., *Rolfe*, B.

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MAYHEW and Another v. BLOFIELD.

Nov. 25.

IN this case a rule had been obtained, calling upon the plaintiffs to shew cause why judgment signed by them, and all subsequent proceedings thereon, should not be set aside.

The action was by the plaintiffs as indorsees of one J. Laffeaty of a bill of exchange for £20, against the defendant, the acceptor.

The defendant, being under terms to plead issuably, pleaded, secondly, "And for a further plea in this behalf the defendant says, that, before and at the time of the alleged indorsement of the said bill of exchange by the said J. Laffeaty, as in the declaration mentioned, the said J. Laffeaty was and still is indebted to the defendant in the sum of 1*l*. 13*s*. 1*d*. for a true and just debt, to wit, for money before then had and received to the use of the defendant, and for money found to be due and owing from the said J. Laffeaty to the defendant on an account stated by and between the defendant and the said J. Laffeaty; and the defendant further saith, that the said J. Laffeaty, before and until the time of the said indorsement to the plaintiffs above mentioned, held and retained the said bill upon the terms then agreed upon by and between the said J. Laffeaty and the defendant, that the debt so due from the said J. Laffeaty to the defendant should be set off against, and deducted from, the said sum so due from the defendant to the said J. Laffeaty upon the said bill; and the defendant further saith, that the said J. Laffeaty, at the time of the alleged indorsement, in order to deprive the defendant of his right of set-off in respect of his said sum of 1*l*. 13*s*. 1*d*., did, in fraud of the defendant, and in collusion with the plaintiffs, and contrary to the said terms so agreed upon as aforesaid, indorse the said bill of exchange in the declaration mentioned; and the defendant says, that the

To an action on a bill of exchange for 20*l*., drawn by J. L., and indorsed to the plaintiffs, and accepted by the defendant, the defendant pleaded, that, before and at the time of the indorsement, J. L. was indebted in 1*l*. 13*s*. 1*d*. to the defendant, and that J. L. held the bill on the terms that the sum so due should be set off against the amount of the bill; and that J. L., in fraud of the defendant, and in collusion with the plaintiffs, indorsed the bill to them, who sued as agents merely of J. L.: —*Held*, that the plea was not issuable.

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plaintiffs sue in this action, and prosecute and still maintain the same, only as agents of and for the said J. Laffeatty, according to the said fraud and collusion."—Verification.

The plaintiffs signed judgment, on the ground that this plea was not issuable.

Petersdorff now shewed cause.—The plaintiffs were right in signing judgment, for the plea is not issuable. It is not confined to the sum of 1*l*. 13*s*. 1*d*. It is, however, at all events, an answer to that sum only. Where a plea professes to answer the whole cause of action, and only answers part, it is bad: *Parratt v. Goddard* (a); and the plaintiff is not bound to demur, when the defendant is under terms of pleading issuably. Further, this plea contains two or three defences—fraud and covin, and that the plaintiffs hold as agents of J. Laffeatty. The replication de injuriâ could not be safely replied, as it might be contended that it is a plea of set-off. It is the rule that a plea is not an issuable plea, unless the plaintiff can safely take issue upon it in order to go to trial.—He referred to *Thomson v. Redman* (b).

Hawkins, in support of the rule.—The plea professes to be an answer to the whole declaration, as it commences "and for a further plea in this behalf;" and it is an answer to the whole declaration. It is in effect a set-off; and the allegation, that the bill was indorsed to the plaintiffs in fraud of the defendant, and in collusion with the plaintiffs, is to give the defendant his right of set-off, which he would not be entitled to against an innocent indorsee of the bill: *Burrough v. Moss* (c). *Parke, J.*, there says: "If there is an agreement, either express or implied, affecting the note, that is an equity attaching upon it, and is available against any person who takes it when over due." [*Alderson, B.*—This plea may, perhaps, be good as to 1*l*. 13*s*. 1*d*.] In

(a) 9 M. & W. 458. (b) 11 M. & W. 487. (c) 10 B. & C. 558.

Watkins v. Bensusan (a) there was a plea similar to the present: Lord *Abinger* expressed it as his opinion that the plea was good, and said, in the course of the argument, "I cannot say that this is a bad plea, and therefore not issuable. It says, in effect, that the plaintiff is not the real owner of the bill, and has no right to sue upon it, and that he is only doing so to deprive the defendant of his right of set-off." [*Pollock*, C. B.—There the set-off was equal to the amount of the whole bill. *Alderson*, B.—It may be good as to 1*l.* 13*s.* 1*d.*, but it is not an issuable plea so as to enable the plaintiffs to go to trial on the merits.] The defendant has an affidavit of merits.

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PER CURIAM (b).—The rule will be absolute, if the defendant will consent to bring the balance into court within a week, and to change the venue.

Rule accordingly.

(a) 9 M. & W. 422.

(b) *Pollock*, C. B., *Alderson*, B., and *Rolfe*, B.

FRYER v. ANDREWS.

Nov. 11.

IN this case the defendant had obtained a rule, in general terms, to plead coverture and the Statute of Limitations to a declaration containing two counts upon two promissory notes, and a count upon an account stated. A summons was obtained to set aside these pleas, on the ground that the defendant, who was a married woman, had appeared by attorney. An order was accordingly made to set aside the

To a declaration which contained three counts, the defendant, who appeared by attorney, upon a rule in general terms to plead coverture and the Statute of Limitations, pleaded these

defences to the whole declaration. The pleas were set aside by a judge at chambers, on the ground that the defendant, who appeared by attorney, had pleaded coverture. The defendant, without a fresh rule to plead, and without entering a fresh appearance, pleaded coverture to the two first counts, and the Statute of Limitations to the whole declaration. The plaintiff having signed judgment as for want of a plea—*Held*, that the judgment was irregular, inasmuch as the pleas were sanctioned by the original rule.

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pleas, and the defendant had two days' further time to plead *de novo*. The defendant thereupon, without entering a fresh appearance, or obtaining a new rule to plead, pleaded the Statute of Limitations to the whole declaration, and coverture to the two first counts. The plaintiff thereupon signed judgment as for want of a plea, and this judgment was set aside by an order of *Platt*, B., the plaintiff to pay the costs.

Unthank now moved for a rule, calling on the defendant to shew cause why this order of *Platt*, B., should not be rescinded, or why the rule to plead several matters should not be set aside.—The judgment signed by the plaintiff was regular, as the defendant had not liberty to plead the second plea to the two first counts; she should have pleaded it to the whole declaration. The pleas do not now agree with the rule to plead several matters. [*Parke*, B.—The second plea is sanctioned by the rule to plead several matters, which is in general terms.] In the next place, the learned judge set aside the rule to plead several matters when he set aside the pleas; the defendant therefore should have obtained a fresh rule. [*Parke*, B.—The only question is, whether the first order sanctioned the defendant to plead the last set of pleas. I think the defendant had liberty to plead those pleas in the manner in which they are pleaded.]

POLLOCK, C. B.—I do not see why a person who makes a bad use of the rule to plead several matters in the first instance should not afterwards make a good use of it, as the defendant has done in the present case. There will be no rule.

PARKE, B.—I think that the first rule warranted the second set of pleas. The first set of pleas were set aside on a collateral ground,—that it was not proper to appear

by attorney and to plead coverture. I think, therefore, that the judgment signed was irregular, and that the order for setting it aside was right.

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ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

INNES and Another v. MUNRO.

Nov. 9.

ASSUMPSIT on a bill of exchange for £3000, drawn by one Langford Lovell Hodge, on the 10th of November, 1846, upon and accepted by the defendant, payable six months after date to the order of Hodge, and indorsed by him to the plaintiffs.

The defendant pleaded, secondly, that the defendant so accepted the said bill in the declaration mentioned on certain terms and conditions, which, before the time of the accepting of the said bill in the declaration mentioned, to wit, on the 13th day of November, 1843, were agreed upon in writing by and between the said L. L. Hodge and the defendant, namely, the terms following, that is to say, that if crops to the value of the amount of the said bill (being crops the produce of a certain estate situate in parts beyond the seas, called the West Indies) should not, before the said bill should become due according to the tenor and effect thereof, have come to England, the said bill should not, nor should any part of the amount thereof, be paid by the defendant when the same should become due, according to the tenor and effect thereof, but the same should then be renewed by the said L. L. Hodge drawing on the defendant, and by the defendant's accepting another bill of ex-

H. having advanced large sums of money to the defendant on account of certain estates in the West Indies of which they were joint owners, received from the defendant two promissory notes to the amount of £3000 upon an agreement which contained the following terms:— "Should the crops (of the estates) not come forward in time to provide for these notes, I shall expect to have them renewed for such period as may be found necessary from the condition of the properties." The crops proved unproductive, and the notes

were renewed three times: the present action was brought on the third renewed bill, which had been indorsed to the plaintiffs with a knowledge of the agreement:—*Held*, that the agreement stipulated for one renewal only, and that the plaintiffs were entitled to recover.

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change for amounts together amounting to £3000; such other bill or such other bills to be payable to the order of the said L. L. Hodge, at such a time as should, according to the condition of the said estates, be reasonably necessary to allow crops to the aforesaid value, and the produce of the said estates, coming to England by such last-mentioned time, and by the said L. L. Hodge and the defendant so as aforesaid drawing and accepting the said other bill or other bills for or on account of the said sum of £3000 in the declaration mentioned, and for and on account of and in renewal of the said bill in the declaration mentioned, to which last-mentioned time the payment of the amount of the bill in the said declaration mentioned should be postponed. And the defendant further says, that crops to the value aforesaid, being the produce of the said estates, did not before the said bill in the declaration mentioned became due, according to the tenor and effect thereof, come to England. And the defendant further says, that at the time when the said bill became due according to the tenor and effect thereof, and from thence to the commencement of this suit, the defendant was, and yet is, ready and willing to renew the said bill in the declaration mentioned, by accepting another bill of exchange for £3000, or other bills of exchange for amounts together amounting to £3000, drawn by the said L. L. Hodge upon the defendant, and payable to the order of the said L. L. Hodge, at such time as then, according to the conditions of the said estates, was reasonably necessary to allow of crops to the aforesaid value, and the produce of the said estates, coming to England by such last-mentioned time, and by accepting such other bill or other bills, for and on account of the said sum of £3000 in the declaration mentioned, and for and on account of and in renewal of the said bill in the first count mentioned; but the said L. L. Hodge did not draw on the defendant any such other bill or other bills as aforesaid, but wholly omitted so to do. And the defendant further says, that the

said time which was so reasonably necessary for the purpose aforesaid was and is a certain time which had not arrived at the commencement of this suit, to wit, the 1st October, 1847. And the defendant further says, that the said bill in the declaration mentioned was, as therein mentioned, indorsed to the plaintiffs before the same became due; and that the plaintiffs, before and at the time the said bill was first indorsed to them and they first received the same, had full notice that the said bill had been accepted on the said terms and conditions so agreed on as aforesaid.—Verification.

Replication, de injuriâ, and issue thereon.

At the trial before *Parke*, B., at the last summer assizes for Kent, it appeared that the defendant and L. L. Hodge, the drawer of the bill in question, were, and had been previously to the year 1843, jointly interested in certain estates at Berbice, in the West Indies. Hodge had made large advances to the estate, which was much encumbered; he therefore urged the defendant to give promissory notes, in order to raise money for the estates; and in consequence of its appearing, on examination of the accounts, that the balance against the estate was upwards of £16,000, and it having been agreed that Mr. Hodge's mortgage-debt should be fixed at £8000, and as it was expected that the crops of that year would reduce the excess of that sum to £6000, it was for the moiety of the latter sum that the defendant was requested to give his promissory notes; and to prevent any misunderstanding as to the terms upon which they were to be provided for, it was settled that the terms should be stated in a letter from the defendant to Hodge, and his assent given to it. The following letter was thereupon written. The answer of Hodge indorsed upon the back of the letter completed the agreement:—

“L. L. Hodge, Esq. London, Nov. 13, 1843.

“Dear Sir,—According to our calculations this morning, there will be £14,000 owing to you by the Berbice estates,

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after deducting the proceeds of the crops this year. As the said £14,000 are £6000 more than the standing balance of £8000, I beg to inclose my notes for £2000 and £1000, together £3000, as the one-half of the excess. Should the crops not come forward in time to provide for these notes, I shall expect to have them renewed for such period as may be found necessary from the condition of the properties.

“I am, dear sir, &c. &c.,

“WILLIAM MUNRO.”

This letter bore the following indorsement:—

“Dr. Munro,

“Dear Sir,—What is stated on the other side is fully understood between us.

“LANGFORD LOVEL HODGE.

“London, Nov. 13, 1843.”

The bill of exchange upon which the present action was brought, was the third renewal of the notes, which were given in accordance with the agreement of 1843. The estates having yielded no surplus, it was contended by the defendant's counsel, that as the agreement was for a renewal of the notes from time to time, till there should be proceeds from the estates to provide for the renewed bills, that the defendant was entitled to the verdict. His Lordship, however, was of opinion that the agreement included one renewal only, and directed the jury to find a verdict for the plaintiff, but reserved leave to the defendant to enter a verdict, if the Court should think otherwise.

Lush now moved accordingly.—The defendant was entitled to the verdict, as the plea was proved. The question turns upon the construction of the agreement of 1843. The notes which were then given by the defendant were

to be paid out of a particular fund, these notes were to be renewed till funds should be forthcoming to meet them. [*Pollock*, C. B.—The meaning of the agreement is, that if the crops failed, the notes should be renewed *once*.] The parties to the agreement did not so understand it, as the bill on which the present action is brought is a third renewal. [*Pollock*, C. B.—The letter speaks of “such period,” not “periods.” We cannot alter the contract because there has been more than one renewal of the notes.]

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POLLOCK, C. B.—There will be no rule in the present case. The meaning of the agreement is, that there should be one renewal.

ALDERSON, B.—I am of the same opinion. I cannot say that it was to extend to more than one renewal. In order to support the position for which the defendant contends, the stipulation should have been that the notes were to be renewed from time to time.

PARKE, B., and ROLFE, B., concurred.

Rule refused.

GORDON v. STRANGE.

Nov. 22.

ASSUMPSIT.—The declaration contained counts for the schooling and boarding of the defendant's son. Plea, amongst others, payment.

At the trial, before the under-sheriff of Middlesex, in July last, it appeared that the defendant's son had been at the plaintiff's school, near Slough. On the removal of the

Where the defendant, in answer to a letter demanding payment, sent a post-office order, in which the plaintiff was described by a wrong

Christian name, and the plaintiff kept it, but did not cash it, although he was informed at the post-office he might receive the money at any time by signing it in the name of the payee:—*Held*, that this was no evidence of payment.

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boy there arose some dispute as to the amount due, and several letters passed between the plaintiff and defendant. In answer to one of these, requesting payment, the defendant sent a post-office order, which by mistake was made payable to *Frederic Gordon*, the plaintiff's Christian name being *Francis*. The plaintiff did not get it cashed, although he was told by the person who kept the post-office that he might receive the money by signing it in the name of the payee, as there was no one of the same name in the neighbourhood. The plaintiff had kept the order. The under-sheriff told the jury, that the plaintiff was not bound to put any name to it but his own; but that if he kept it, knowing that he might receive the money for it at any time, that would be evidence of payment.

Snow having obtained a rule nisi for a new trial, on the ground of misdirection—

Pearson now shewed cause.—If the plaintiff's true name had been on the order, and he had kept it, that would have been equivalent to payment. Here he might have received the money at any time by signing it; and he ran no risk by doing so, as he was the person truly entitled to it. By keeping it he has waived the mistake in the Christian name. [*Parke, B.*—He might well pause before he signed it in any name but his own.]

POLLOCK, C. B.—The rule must be absolute. We think that the under-sheriff was wrong in directing the jury that the fact of the plaintiff's having kept the order was equivalent to a waiver of the mistake in his name. These facts are no evidence of payment.

PARKE, B.—The defendant had no right to give the plaintiff the trouble of sending back a piece of paper which he had no right to send him. Suppose goods had been left

at the plaintiff's house, could that be taken as payment, because the plaintiff did not take the trouble to send them back?

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ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

In re AYKROYD, in a *Plaint of GRIMBLY v. AYKROYD (a)*. April 29.

MARTIN, in the present term (Nov. 13) obtained, on behalf of Aykroyd, a rule calling on the judge of the county court of Worcestershire, and Thomas Grimbly, to shew cause why a writ of prohibition should not issue, directed to the judge of the said county court, to prohibit the said court from further proceeding in certain plaints.

It appeared from the affidavit of Aykroyd, that he was a contractor with "The Oxford, Worcester, and Wolverhampton Railway Company," for the construction of a portion of that railway, and in that capacity had employed one Bugbird and others, as sub-contractors, to make bricks for

The 63rd section of the Small Debts Act, 9 & 10 Vict. c. 95, enacts, "that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said courts:"—*Held*, that the term "cause of action" meant "cause of one action," and

was not limited to an action on one separate contract.

In the case of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one entire demand, such demand, if it exceeds £20, ceases to be within the jurisdiction of the county court.

Therefore, where the sub-contractor of a railway company gave his workmen tickets or orders for goods, which were supplied by the plaintiff, and the latter brought 228 actions in the county court against the defendant in respect thereof for sums amounting in the aggregate to 303*l.* 19*s.*, the Court granted a prohibition, though one claim only amounted to £5 and many to less than 20*s.*

Quere, whether the 63rd section of the Small Debts Act applies to all debts which could be comprised in one description in one count.

Quere, whether a prohibition ought to be granted where a cause of action has been improperly divided into several suits, but the aggregate amount claimed does not exceed £20.

(a) Decided in Easter Term, 1848, but published early on account of its importance.

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him, and to do other work upon the railway. The sub-contractors were accustomed to pay their men from time to time partly in cash and partly by tickets for goods, to be obtained at the shop of Grimbley, who carried on the business of a grocer in the town of Chipping Campden. The following is the form of one of the tickets, the others being similar in substance:—

“ Micheton Hill, July 10, 1847.

“ Mr. Grimbley,—Let the bearer, Thomas Yeates, have goods to the amount of 20s.

(Signed)

“ THOMAS BUGBIRD.”

Three thousand of these tickets had been presented to Grimbley, and he had supplied the men with goods to the amount specified in the tickets. On the 17th September, Aykroyd was served with 228 summonses to appear at the Worcestershire county court, to answer Grimbley as to each of the summonses “in an action on contract for goods sold.” The several sums sought to be recovered by these 228 summonses amounted in the whole to 303*l.* 19*s.*, but only one of the summonses was issued for the recovery of a sum amounting to £5, and many were for the recovery of sums under 20*s.* The affidavit also stated that Aykroyd never sent any of his workmen or labourers, nor the workmen or labourers of any of the sub-contractors, to Grimbley for goods, nor ever gave Grimbley any promise, in writing or otherwise, to pay for goods supplied by him to any person or persons whomsoever.

The affidavit of Grimbley, in opposition to the rule, stated that, from the 8th of June to the 19th of July, he received at different and distinct times a great many separate and distinct written orders for the delivery of separate and distinct parcels of goods to different men on the said railway works, and such parcels of goods were, according to such separate and distinct written orders, delivered by him to the said several men; that each of the orders so received

and executed did not at any time amount to 40*s.*, and that he had upwards of 3000 tickets for the delivery of goods to men employed on the said railway.

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Whitehurst and *Pigott* shewed cause.—(January 29, 1848).

—The question depends upon the construction of the 9 & 10 Vict. c. 95, intituled “An Act for the more easy recovery of Small Debts and Demands in England.” The 58th section enacts, “that all pleas of personal actions, where the debt or damage claimed is not more than £20, whether on balance of account or otherwise, may be holden in the county court without writ, and all such actions brought in the said court shall be heard and determined in a summary way in a court constituted under this act, and according to the provisions of this act: provided always, that the court shall not have cognisance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage.” The 59th section requires suits to be commenced by plaint. The 63rd section enacts, “that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said courts; but any plaintiff *having cause of action* for more than £20, *for which a plaint might be entered under this act* if not for more than £20, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding £20; and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of judgment shall be made accordingly.” Upon the true construction of those sections, a party who has made several separate

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contracts for sums under £20, may sue by several plaints in the county court, although the aggregate amount of the sums due exceeds £20. The words in the 63rd section "in full discharge of all demands in respect of such cause of action," mean in discharge of the cause of action on that particular plaint, not of every cause of action. [*Alderson*, B.—If these 228 suits had been for debts of one shilling each, might not one plaint have been entered for the whole?] The plaintiff would not be bound to include the whole in one plaint. If a person purchases goods of a tradesman, for which he gives a promissory note for £10, and on a subsequent day makes another purchase, for which he gives a note for £5, the tradesman might enter separate plaints in the county court upon each note. [*Pollock*, C. B.—The statute must be construed with reference to the law as it stood before it passed, and in an anonymous case in *Ventris*, 65, it is expressly laid down, "that if there be several contracts between A. and B. at several times for several sums, each sum under 40s., and they do all amount to a sum sufficient to entitle the superior court, they shall be there put in suit, and not in a court which is not of record."] If a plaintiff has a cause of action on a simple contract debt for £20, and also on a bond for the same amount; or if he is entitled upon a breach of covenant to recover damage to the amount of £5, and he has also a cause of action for a trespass in which he lays his damage at £5, must he not bring separate suits in the county court? [*Pollock*, C. B.—In such case there may be a technical difficulty, arising from the different forms of action, but that does not exist here.] The anonymous case in *Ventris*, 65, is clearly incorrect, as it purports to be the report of a case decided in the 22 Car. 2, upon a resolution in the case of the Savoy Court and Staundforde, 24 Car. 2; and the report goes on to say, it was also resolved "that if a man at divers times steals things, all which amount to above 12d., 'tis felony capital." In the

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case of *Girling v. Alders* (a), it does not distinctly appear what the precise contract was: it may have been a single contract for the delivery of several parcels of malt at different periods. That would be consistent with what is laid down in Fitzherbert's Nat. Brev. (b), where it is said, "And if a man sue another in the county court for debts or chattels which do amount to the sum of 40s., then the party shall have a prohibition against him who is sheriff, that he shall not hold plea thereof, and that he tell the party that he sue in the Common Pleas, and the writ is such." The form of the writ there given is important—"The King to the sheriff, &c.: Whereas pleas of chattels and debts which amount to the sum of 40s., or exceed it, according to the law and custom of our realm, ought not to be pleaded without our writ, and as we hear A. hath impleaded B. touching a debt of 100s. in your county without our writ, we command you, if it be so, that then you absolutely supersede that plea from being further holden in the county aforesaid without our writ, and on our behalf, that you tell the aforesaid A. that he may, upon request, obtain our writ of the debt aforesaid against the aforesaid B., if it shall seem to him expedient. Witness, &c." It appears, therefore, that a writ of prohibition must state the amount of the debt. In the case of *Rex v. The Sheriff of Herefordshire*, in a cause of *Dealey v. Clark* (c), it appeared that the plaintiff, who was a carrier, had conveyed goods for the defendant, and the carriage amounted to 1*l.* 4*s.* In about a month afterwards he carried more goods for the defendant, and the carriage on that occasion also amounted to 1*l.* 4*s.* For those sums respectively he commenced two suits in the county court, and the Court of King's Bench refused a prohibition, holding that the causes of action were distinct, and that the plaintiff was entitled to sue separately for each demand. Lord *Tenterden* there said, "I am of opinion that

(a) 1 Vent. 73.

(b) Page 46 a.

(c) 1 B. & Adol. 672.

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this case does not come within the rule of law which prohibits the splitting of a cause of action into several portions for the purpose of commencing suits for each in an inferior court; to be so, the cause of action must be one and entire. But in this case the two items of 1*l.* 4*s.* each are perfectly distinct debts, the one having no connection with the other. When the defendant incurred the debt stated in the first item, the plaintiff might have sued him for it in the county court, and his having incurred another and distinct debt with the plaintiff afterwards should not, I think, have the effect of depriving the plaintiff of his remedy in the county court for the first debt. And if he may still have that remedy for the first debt, he has it, of course, for the second also." The reporter there refers to 19 Hen. 6, 54, pl. 17, as an authority, that "If there be *one entire contract* above forty shillings, and a man sues for it in a court baron, severing it into divers small sums under forty shillings, a prohibition shall be granted, because this is done to defraud the court of the king." The law is stated in similar terms in Bacon's Abridgment, tit. "Prohibition," K. Again, in Fitzherbert, Nat. Brev. (a), it is said, "And so if the executor sue in the county, or in a court baron, for a debt of five marks by divers plaints; whereas the debt is upon a contract, or upon an obligation. Now the defendant may shew the same, and plead unto the jurisdiction of the court, or he may have a writ of prohibition directed unto them, that they do surcease," &c. But in none of the above authorities is the term "cause of action" made use of; and it is evident that the law there stated has reference to one single and entire contract. If in this case the defendant had been desirous of pleading to the jurisdiction of the county court, it is difficult to see in what way a good plea could be framed. He must have pleaded, that, though true it was he owed the plaintiff 20*s.*, yet he also owed him, on other contracts,

sums exceeding £20. In *Neale v. Ellis* (a), which arose on the Brighton Court of Requests Act (3 Vict. c. x, s. 24), Coleridge, J., held that a plaintiff who had demands for the price of a horse, for goods sold and delivered, and for rent, was entitled, after having sued for and recovered £15 in respect of the horse by plaint in the county court, to maintain his action in the superior court for the residue of his claim. In this case there are numerous contracts, each implied from a different state of facts, which therefore must, for the purposes of this argument, be treated as express contracts, made at different times and under different circumstances. In *Udall on the County Courts Act* (b), there is cited, from Napier's Digest, a case of *Hamblin v. Hamblin*, on the Irish Civil Bill Act, 36 Geo. 3, c. 25, s. 8, which enacts "that no cause of action still subsisting, and in the whole amounting to a sum beyond such sum as is made, according to the nature of the case, recoverable by force of this act, shall be split or divided, so as to be made the ground of two or more different actions in order to bring such cases within the jurisdiction created by this act." In that case, where A. lent B. a sum of money, and some time afterwards another sum, it was held that A. might sue for them separately. [*Alderson, B.*—The interpretation clause, section 142, enacts, that "in construing this act, every word importing the singular number shall, where necessary to give full effect to the enactments herein contained, be understood to mean several persons or things as well as one person or thing."] The term "cause of action," in the 63rd section, cannot be read in the plural. Such a construction can only be made in order to give full effect to the enactment; but the general object of the statute, as appears from the preamble, was not to restrict the right to sue in the county courts, but to extend it "to all debts and demands, and all damages arising out of any express or implied agree-

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(a) 1 Dowl. & L. 163.

(b) P. 97, 3rd edit.

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ment, not exceeding £20." [*Alderson, B.*—The 63rd section is a restraining clause against splitting, and we ought to give full effect to it. The interpretation clause says, that words are to be used in a particular sense when it is necessary to give effect to the *enactment*, not the statute.] If these several debts are to be considered as one cause of action, when would the Statute of Limitations begin to run?

Martin and Hugh Hill, in support of the rule.—It is admitted that where there are two contracts of a wholly distinct nature, as on a bond or a promissory note, and also for goods sold, there may be a difficulty in including both in one plaint. But where a tradesman supplies a customer with articles of the same description for a length of time, his claims in respect of them are amalgamated into one debt, and become one entire cause of action within the meaning of the statute, as much as a debt for rent arising out of a tenancy from year to year. Where, for instance, a butcher supplies a party with meat for a whole year, it would be absurd to hold that a distinct cause of action arises from each day's supply. The true doctrine of law is stated in *Girling v. Aldas* (a), viz. that "if the causes may be joined in one action, they must." A debt sued on may consist of several items: *Shaddrick v. Bennett* (b). This view is supported by the 58th section, which gives the county court jurisdiction in "all pleas of personal action, where the debt or damage claimed is not more than £20, *whether on balance of account or otherwise.*" Those latter words were probably inserted to prevent a recurrence of the questions raised in *Clark v. Askeu* (c), and *Porter v. Philpot* (d). The 63rd section must be construed with reference to the 58th, which clearly points to an account consisting of more than one

(a) 2 Keble, 617.

(b) 4 B. & C. 769.

(c) 8 East, 28.

(d) 14 East, 344.

item. If the argument on the other side be correct, the latter portion of the 63rd section would be superfluous, for the case of *Lord Bagot v. Williams* (a) shews that at common law a person who sued in an inferior court for part of a debt was considered to have abandoned the residue. In that case the defendant had received at different times various sums of money arising from the sale of the plaintiff's timber, and the Court treated those sums as constituting one entire cause of action. That decision can only be supported on the principle, that where, under a continuous transaction or dealing, several debts accrue, they become amalgamated and form a single cause of action. [*Parke, B.*—The case of *Hesheth v. Fawcett* (b) shews the distinction between one entire contract, and one cause of action which may arise from several different employments or contracts.] *Lord Bagot v. Williams* was acted on in *Dunn v. Murray* (c). The case of *Hamblin v. Hamblin* is unsatisfactory, for the Irish judges seem to have been governed solely by the authority of *Rex v. The Sheriff of Herefordshire* (e), which was decided on a statute very different in terms from the Irish Civil Bill Act. [*Alderson, B.*—Is there any course of practice in the county court as to the mode in which an abandonment of part of a claim is to be taken advantage of? *Manning*, Serjt., amicus curiæ.—The abandonment would appear on the face of the summons.]

Cur. adv. vult.

The judgment of the Court was in Easter Term, 1848, (April 29), delivered by

POLLOCK, C. B.—In this case a prohibition to the judge of the county court of Worcestershire was moved for, a rule

(a) 3 B. & C. 235.

(b) 11 M. & W. 356.

(c) 9 B. & C. 780.

(d) 9 B. & C. 780.

(e) 1 B. & Adol. 672.

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nisi granted, and cause shewn in the last term before my Brothers *Parke, Alderson, Platt*, and myself. It appeared from the affidavits, that on the 19th of September last, 228 summonses were issued out of the county court at the suit of the plaintiff *Grimbly*, against the defendant *Aykroyd*, for sums amounting in the aggregate to 303*l.* 19*s.*, one claim only amounting to the sum of £5, and many to less than twenty shillings. These demands arose out of an order alleged to have been given by the defendant, a railway contractor, to the plaintiff, a grocer, to supply with goods the workmen employed by certain persons who were sub-contractors with the defendant. Tickets appear to have been given by the sub-contractors, and signed by them, each for a certain amount, and these tickets amounted to 3000; but actions were brought, not for each supply, but apparently each for the amount of all the supplies to one workman. The defendant's affidavit denies all liability to these demands, on the ground that he never gave the order, or, if he did, that he was not personally liable, but only as on a guarantee; and the order was not in writing. But for the purpose of our present decision this is wholly immaterial; the question being, whether, on the assumption that he was indebted, the county court had jurisdiction.

This depends upon the construction of the Small Debts Act, 9 & 10 Vict. c. 95, particularly section 63, and not upon the old rule of the common law as to the jurisdiction of the county court. It will be proper, however, to consider what that rule was, in order to give a construction to the County Court Act. At common law the county court held no plea of debt or damages to the *value of forty shillings* or above (4 Inst. 266), "*Placita de catallis debitis, &c. quæ summam 40*s.* attingunt vel eam excedunt, sine brevi Regis placitari non debent*;" 2 Inst. 302; and if an *entire* contract or debt of 40*s.* or upwards was severed into sums below 40*s.*, a prohibition was granted; Roll. Abr. Prohib. 317; and without saying that the debt arose on an *entire*

contract. Fitzherbert, in his *Natura Brevium* (a), lays it down, that if a man do *owe unto another man five marks*, and he sue several plaints for the same in the county court or any other court (meaning, no doubt, the hundred court or court baron) against the debtor, he shall have prohibition thereof, and rehearse the matter, and that it would defraud the king's court of its jurisdiction. This doctrine was applied to contracts made at different times between the same persons, for several sums each less than 40s., but together amounting to more, in an anonymous case, Vent. 65, and in *Girling v. Alders*, Vent. 73, reported in 2 Keble, 617, by the name of *Girling v. Aldas*, which was for the price of different parcels of malt sold at different times, "because though they be several contracts, yet forasmuch as the plaintiff might have joined them all in one action, he ought so to have done, and sued in the court above, *and not put the defendant to an unnecessary vexation*; no more than he can split an *entire* debt into divers, to give the inferior court jurisdiction in fraudem legis." The reason given is a very satisfactory one, for it would be extremely vexatious if a plaintiff from whom goods had been purchased in small quantities at small prices at different times, by distinct contracts, either payable immediately, or on credit which had expired, instead of uniting all in one action, which he could do after the debts were all due, should divide them into several and sue for each in a separate action in the county court, which could give no adequate relief by consolidating them, in the exercise of their equitable jurisdiction (if they had any), as a superior court would, for they could not unite them so as in the aggregate to exceed or be equal to 40s. The extent to which that vexation might be carried may be illustrated by the present case, in which it is sworn that there were 3000 different tickets, and consequently 3000 different items or separate contracts. It is true, in-

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deed, that when each contract was due in cash, the creditor might, in the absence of any express or implied contract to the contrary, immediately sue for it; but when several debts had become due, he could unite them in one count on debt or simple contract, or indebitatus assumpsit, as one entire debt, and there seems no good reason why he should not. In the subsequent case of *Rex v. The Sheriff of Herefordshire (a)*, the judgment of Lord Tenterden, that, to bring a case within the rule of law which forbids splitting, the cause of action must be one and *entire*, is at variance with the law laid down in the above-cited authorities. The case itself may be distinguished, because there the debts were treated as being entirely distinct and separate from each other, the one having no connection with the other; but in the case of a running bill with a tradesman, the items are generally connected, the first contract being usually made with the understanding that if not paid for until after others have been made, it is to form part of the same debt, so that several items are to be united into one bill. But the result of the decision altogether is to render it impossible to rely on the authority of the former cases, which otherwise would have disposed of the present question, supposing it to be decided by the rule of the common law. The present case, however, does not depend upon these authorities, but on the construction of the recent act, 9 & 10 Vict. c. 95.

By the 58th section, the new court has jurisdiction in all pleas of personal actions, where the debt or damage claimed is not more than £20, whether on *balance of account or otherwise*. This clause was probably introduced in consequence of the provisions in some of the courts of requests acts, that the act should not extend to any debt for the balance of an account *originally* exceeding a given sum (b). Be that as it may, it cannot be doubted that the clause was meant to give jurisdiction where the debt claimed

(a) 1 B. & Adol. 672.

(b) See *Porter v. Philpot*, 14 East, 345.

consisted of various items, either together originally not exceeding £20 at the time of the suit, or being reduced to that amount by payment, or an allowed set-off of other sums. We are next to consider the 63rd section, and the whole question turns upon the meaning of the term "cause of action" in that section. It is provided, "that it shall not be lawful to divide any cause of action for the purpose of bringing two or more suits in any of the said courts, but any plaintiff having cause of action for more than £20, for which a plaint might be entered under this act if not for more than £20, may abandon the excess, and thereupon the plaintiff shall, upon proving his case, recover to an amount not exceeding £20, and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such causes of action, and entry of the judgment shall be made accordingly."

What, then, is the construction of the term "cause of action?" The term "debt or damage" is not used as it is in the passage above cited from 4 Inst. 266, but the more extensive term adopted is "cause of action." This term does not necessarily mean a cause of action on one single entire contract, for there may be one cause of action on several debts contracted at different times, and in far the greater number of cases, a count in indebitatus assumpsit or debt is founded on many distinct contracts, as was pointed out in the case of *Hesketh v. Fawcett* (a), and one count may be considered as one cause of action. To provide that one cause of action on one entire contract should not be divided, would be unnecessary and surplusage; and though an argument, that a clause in an act of Parliament, if understood in one sense would be operative, in another inoperative, is not by any means a conclusive one, because it must be admitted that clauses are often introduced *ex abundanti cautela*, yet it is of some weight, and the probability is, that the legislature,

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(a) 11 M. & W. 360.

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in enacting that a cause of action should not be divided, meant a cause of action which but for the enactment would be divisible; and when it is considered to what abuses the narrower construction of this term would lead (which is strongly exemplified in the present case, in which 228 actions have been commenced, and 3000 might have been brought), we think we may safely conclude that the term "cause of action" ought to be interpreted one cause of action, and not to be limited to an action on one separate contract. But, on the other hand, if the term is to comprise all debts that might be included in one count, debts for work and labour, goods sold, use and occupation, &c., though totally unconnected with each other, which might be included in one indebitatus count, would be prevented from being divided under this clause, and if *indivisible*, and the creditor brought an action for any part, he would virtually abandon all the remainder by the operation of the latter part of the 63rd section. In such a case Mr. Justice *Cole-ridge* held that a similar clause in the Brighton Court of Requests Act (3 & 4 Vict. c. 10, s. 24) did not apply, the demand there being for three distinct things—for a horse sold, for rent, and for goods sold, but he made a distinction between that case and one where a debtor has a bill running from day to day: *Neale v. Ellis* (a). In such a case, though each item of goods supplied or work done constitutes a separate contract, so that after the stipulated price becomes due, the tradesman could sue for one item, yet the understanding is, undoubtedly, that it shall be united with other items and form one entire demand; and doubtless, if, after several other items were added to the first, the tradesman were to bring separate actions for each as for a distinct debt, any superior court would deal with such a proceeding as vexatious. It appears, then, that a great inconvenience would follow if the term "cause of action" were interpreted

(a) 1 Dowl. & L. 163.

to mean cause of action on one separate contract, and also if the construction were to be that it was intended to cover all contracts executed, however dissimilar in character, that could be included in one indebitatus count, which, according to the modern practice, may comprise any number of separate unconnected contracts, whenever made, each having ended in a debt before the commencement of the suit. As some extension must be given to the former construction, some restriction must be put on the latter; and we think that we ought to hold that the 63rd clause does apply (whether to all debts which could be comprised in one description in one count as for "goods sold" or not, we need not now decide), but *at all events* to the cases of tradesmen's bills, in which one item *is connected* with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one entire demand. If that demand exceed £20, it ceases to be within the jurisdiction of the county court, and therefore we think that, on the facts disclosed in the affidavit before us, all the debts claimed fell within that description, the total greatly exceeding £20, and consequently they ought not to have been separated into different suits. Whether, if the total had only amounted to £20, and the items then been separated and sued for by separate complaints, the total being within the jurisdiction of the county court, which then could have given adequate relief, the suits could have been prohibited, is a question which need not now be discussed; but when the total exceeds that amount, and justice cannot be done in the county court, we think that that Court has no jurisdiction, and that a prohibition ought to go.

Rule absolute.

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CUTBILL and Others v. KINGDOM.

A Benefit Building Society, established under the provisions of the 6 & 7 Will. 4, c. 32, is not precluded from lending money on mortgage to its own members.

One of the certified rules of such society provided, that no action should be brought or defended until the approbation of the majority of members present at "a special meeting" of the society should be obtained:—*Held*, no objection that the approbation of the majority was obtained at "a special general meeting."

Another rule provided, that a committee should determine all disputes which should arise respecting the construction of the rules of the society, or any of the clauses, matters, or

things therein contained, and also of any additions, alterations, or amendments which should or might thereafter arise between the trustees, officers, and other members of the said society:—*Held*, that the trustees might, notwithstanding, bring an action against a member for the amount of his subscriptions and fines.

Seemle, that, under the 6 & 7 Will. 4, for the regulation of benefit building societies, the legislature intended that no one member should acquire a larger interest than £150 in respect of his share or shares in such society.

COVENANT.—The declaration stated, that the plaintiffs, before and at the time of the making of the indenture hereinafter mentioned, were, and from thence hitherto have been and still are the trustees of a benefit building society, to wit, "The Metropolitan Building Association," established according to the statute in such case made and provided. That the said society at the time of the making of the indenture hereinafter mentioned was, and hitherto hath been, and still is a society established under and by virtue and according to a certain act of Parliament made in the 7th year of his late Majesty King William the Fourth, intituled "An Act for the Regulation of Benefit Building Societies." That at the time of the making of the indenture, all the rules, orders, and regulations, under which the society was then and thereafter to be governed, had been and were duly and according to the statute certified, enrolled, exhibited, and filed, and the society then was, and hitherto hath been, and still is in every respect entitled to the benefit of the statute. That the defendant, before and at the time of the making of the indenture, was a member of the society, and the holder of eight shares and three quarters of another share of and in the funds of the said society. That heretofore, to wit, on the 10th January, A. D. 1844, by a certain indenture then made between the defendant of the one part and the plaintiffs of the other part, after reciting that, by indenture of lease bearing date 6th December then last past, and made between T. Thistlethwayte, T. S. Cocks, and C. Hodgson, trustees of an act of the

35 Geo. 3, for enabling the Lord Bishop of London to grant a lease, with powers of renewal, of lands in the parish of Paddington, &c., for the purpose of building upon, and of certain acts since passed for amending and enlarging the same, of the first part; Charles James Lord Bishop of London of the second part, and the defendant of the third part, certain premises particularly mentioned and described were, for the consideration in the said indenture mentioned, demised by the said T. Thistlethwayte, T. S. Cocks, C. Hodgson, and Charles James Lord Bishop of London, to the defendant, his executors, &c.; also reciting that a building society, called the Metropolitan Building Association, had been established in the city of London, and that rules and regulations had been made for the government and guidance thereof, and had been duly certified, allowed, and enrolled, &c.; also reciting that the defendant was a shareholder in the society; also reciting that the monies to be contributed in respect of each share in the funds of the society amounted to £120, and that the defendant was then entitled to receive out of the funds of the society eight shares and three quarters of another share, being equal to 550*l.* 7*s.* 6*d.*, and that for securing the due and regular payment of the subscriptions, fines, and other monies which should become payable by the defendant in respect of his said shares, &c., and which might become payable by him in respect of any other share or shares which he might at any time thereafter, before a sale of the said premises in the said indenture particularly mentioned and described, under certain trusts created by the said indenture, acquire in the funds of the said society, it had been agreed that the premises in the said indenture particularly mentioned and described should be assigned to the plaintiffs, upon the trusts and in manner in the said indenture thereafter declared:—the defendant did, for himself, his heirs, &c., covenant, promise, and agree to and with the plaintiffs, their executors, &c., that he the defendant, his heirs, &c., should and would well and truly

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pay unto the plaintiffs, their executors, &c., all the subscriptions, fines, and other monies which should become payable by the defendant in respect of the shares then held by him, &c., as and when the same should become payable under the rules and regulations of the said society. The declaration then alleged, that, after the making of the said indenture, and before any sale of the premises thereby assigned, and before the commencement of the suit, the defendant became and was the holder of a large number of other shares of and in the funds of the said society, to wit, twenty shares and one quarter of another share. Averment, that there was due and payable by the defendant, under the rules and regulations of the said society, for subscriptions, fines, and other monies, in respect of the said twenty-nine shares of and in the funds of the said society so held by the defendant, a large sum, to wit, 320*l.* 14*s.* 9*d.*; that the shares of the defendant do not exceed in value £150 for each share, and that the subscriptions as aforesaid do not exceed in the whole 20*s.* for one month for each share.—Breach, that the defendant did not nor would pay or cause to be paid to the plaintiffs the said subscriptions, fines, and other monies payable as aforesaid, for and in respect of the said shares, &c.

The defendant pleaded, first, *non est factum*; after setting out on oyer the indenture declared on, by which it appeared that the premises demised to the defendant by the recited indenture of the 6th December, 1843, were mortgaged by him to the plaintiffs as such trustees, in consideration of 550*l.* 7*s.* 6*d.* paid by them to him out of the funds of the society.

Third plea:—That the said society was not nor is a society established under or by virtue of or according to the said act of Parliament for the regulation of benefit building societies, *modo et forma*.

Thirteenth plea:—That by the said rules and regulations of the society, certified, enrolled, &c., and which were in

force at the time of the making of the said indenture in the declaration mentioned, and from thence hitherto have been and still are in force, it was ordered and declared that, in case it should be necessary to bring or defend any action, suit, or prosecution, criminal as well as civil, in law or in equity, touching or concerning the property or assets, rights, or claim of the said society, or touching or concerning the breach or non-performance of any of the articles, matters or things contained in the said rules, the same should be brought or defended by or in the name or names of the trustee or trustees of the said society for the time being, on behalf of the said society, and he or they should be indemnified from all losses or damages by him or them sustained in consequence of being a party or parties to such proceedings; but that no such proceedings should be taken or defended until the approbation of the majority of the members present at a special meeting of the society should have been obtained. That the claims or demands of the plaintiffs in the declaration mentioned were and are rights or claims of the said society, within the meaning of the said rules; and that this action was and is brought and prosecuted by the plaintiffs, as the trustees of the society, on behalf of the society, for the breach by the defendant of divers articles contained in the rules of the said society, and that the approbation of a majority of the members of the said society present at a special meeting thereof had not been obtained before or at the time of the commencement of this suit, nor has it ever been obtained, as required by the said rules. Verification.

Fourteenth plea:—That by the said rules of the society, certified, enrolled, &c., and which were in force at the time of the making of the indentures in the declaration mentioned, and thence hitherto have been and still are in force, it was ordered and declared that there should be elected, by the members of the said society present at the first general meeting, and at every meeting on the first Wednesday in

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September during the continuance of the society, a president, vice-president, and other officers; that the president, vice-president, and other officers to be elected at the same time should compose the committee for the ensuing year; and in case of the death, resignation, or removal of any such members of the committee or officers, the vacancy should be supplied by the election of some other member or members of the said society or association at the next meeting of the association; and the member or members so added should continue in office till the next general meeting appointed for the election of officers and committee. That the committee of the said society for the time being, or the major part of them, should determine all disputes which might arise respecting the construction of the rules of the said society, or any of the clauses, matters, or things therein contained, and also of any additions, alterations, or amendments which should or might thereafter arise between the trustees, officers, or other members of the said society, and that the decision of the committee, if satisfactory, should be conclusive, but if not satisfactory, reference should be made to arbitration, pursuant to the 27th section of the statute made in the 10th year of the reign of King George the Fourth, for consolidating and amending the laws relating to friendly societies; and that at the first meeting of that society after the enrolment of the said rules, five arbitrators should be elected, none of the said arbitrators being beneficially interested, directly or indirectly, in the funds of the said society; and in each case of dispute, the names of the arbitrators should be written on pieces of paper and placed in a box or glass, and the three whose names were first drawn by the complaining party, or some one appointed by him or her, should be the arbitrators to decide the matter in dispute, whose decision should be final. That the claims and demands of the plaintiffs in the declaration mentioned were, before and at the time of the commencement of this suit, and still are, matters in dispute

between the plaintiffs, as trustees of the society, and the defendant, within the meaning of the said rules; and that the defendant has always been and still is ready and willing to refer the same to the arbitration and determination of the committee for the time being of the society, or the major part of them, or to arbitrators to be chosen in manner as directed by the said rules, according to the true intent and meaning of the said rules, of which the plaintiffs have always had notice. Verification.

The plaintiffs joined issue on the first and third pleas, and to the thirteenth and fourteenth replied *de injuriâ*.

At the trial, before *Coltman, J.*, at the Surrey Summer Assizes, 1847, it appeared that the plaintiffs were the trustees of a building society called "The Metropolitan Building Association," and that the defendant was a member and the holder of twenty-nine shares in the society. The certified "Rules and Regulations" of the society (*a*) were

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(*a*) The rules of the society were preceded by the following, among other statements:—"This association is established for the purpose of enabling parties to purchase freehold or leasehold property in or within twenty-five miles of London: it is proposed to raise by monthly subscriptions from each member or shareholder, a fund out of which to assist subscribers in their endeavours to become possessed of such property as may be best suited to their own interest or advantage. Each shareholder must contribute to the association 10*s.* per month for each share of which he is the possessor, until these monthly payments shall, with the profits, amount to £120 per share. The operations of the

association will extend over a space of about ten years, and then cease altogether.

"When the funds have become sufficiently large to make advances to the subscribers, due notice will be given, and *that* member who will submit to the *largest* deduction of discount from the amount of his share of £120 for priority of advance, will be the one to whom the loan will be *immediately* granted—the property purchased with the association's funds, to be mortgaged to the association as security for the continuation of his monthly instalments, until the termination of the association.

"The subscriptions of those who do not draw their shares are invested on mortgage of freehold

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given in evidence, and it appeared that the present action was brought with the approbation of the majority of mem-

and leasehold property; on the termination of the association, they will be entitled not only to compound interest on the money they have paid, but also to participate in the profits arising from premiums, fines, &c.

"To mortgagors this association will be of great advantage. In the event of the money being required by the lender, the same may be discharged by a loan from this association."

Rule 3. "That in case it shall be necessary to bring or defend any action, suit, or prosecution, criminal as well as civil, in law or in equity, touching or concerning the property or assets, right or claim, of this association, or touching or concerning the breach or non-performance of any of the articles, matters, and things, herein contained, the same shall be brought or defended by, or in the name or names of the trustee or trustees of this association for the time being, on behalf of the said association, and he or they shall be indemnified from all losses or damages by him or them sustained in consequence of being a party or parties to such proceedings, but no such proceedings shall be taken or defended until the approbation of a majority of the members present at a special meeting of the association shall have been obtained.

"That the president of the committee shall have power to

call a *special meeting* of the committee at any time, and the committee shall have power to call a special meeting of the members at any time, by giving three clear days' notice thereof to such members, and specifying the cause of the meeting.

"That the president, on receiving a written request signed by twelve of the members, to convene a *special general meeting* of the association, shall, within three days after receiving such request, convene such meeting by letter," &c.

Rule 8. "That so often as the funds of the association shall amount to a share or sum of £120, (or by an anticipation, that is before the funds actually amount to that sum, if the committee shall so determine,) the share shall be awarded to the highest bidder by ticket or premium for the preference; but no member shall be allowed to advance less than 10s. on each bidding, and the purchaser shall have the privilege of taking as many additional shares at the same rate as he may choose, on giving notice of such an intention to the president at the time of sale, and the committee shall have the power to sell an additional quarter, half, or three-quarter share, at the same premium as the last purchase, if required."

Rule 11. "That when any member shall have been awarded his or her share or shares, pursu-

bers present at a "special general meeting" of the society. On the part of the defendant, it was submitted that the issues on the first, third, thirteenth and fourteenth pleas, ought to be found for him, first, because the objects of the society were not confined to the purposes mentioned in the act for the regulation of benefit building societies, 6 & 7 Will. 4, c. 32 (a), but extended to loans to members on

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ant to Article 8, he or she shall give notice of the situation of the premises intended to be offered for the security thereof to the secretary, and he shall forthwith transmit a copy of the same to the surveyor, and the surveyor shall, within seven days after the receipt thereof, examine the premises mentioned in such notice, and make his report in writing to the committee.

"That when the committee shall be satisfied that the premises so to be offered as aforesaid, are a sufficient security to the association, they shall direct the trustees to pay to such member the sum or sums of money which he or she shall be entitled to receive, on such member executing a deed in trust to sell, or such other valid conveyance, mortgage, or assurance of such premises as the solicitors to the association shall require, and depositing the same and all other necessary title-deeds relating thereto with the trustees, as a security to the said association for so much money as shall therein be expressed to be secured, and the trustees shall make such payment accordingly."

Rule 28. "That the committee for the time being, or the

major part of them, shall determine all disputes which may arise respecting the construction of these rules, or any of the clauses, matters or things herein contained, and also of any additions, alterations, or amendments, which shall or may hereafter arise between the trustees, officers, or other members of this association, and the decision of the committee, if satisfactory, shall be conclusive; but if not satisfactory, reference shall be made to arbitration, pursuant to 10 Geo. 4, c. 56, s. 27; and at the first meeting of this association, after the enrolment of these rules, five arbitrators shall be elected, none of the said arbitrators being beneficially interested directly or indirectly in the funds of this association; and in each case of dispute the names of the arbitrators shall be written on pieces of paper, and placed in a box or glass, and some one appointed by him or her shall be the arbitrators to decide the matter in dispute, whose decision shall be final."

(a) Section 1. "Whereas certain societies commonly called building societies, have been established in different parts of the kingdom, principally amongst

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mortgage securities; secondly, that the action was not brought with the approbation of the majority of members present at a "special meeting," as required by the third rule; thirdly, that the proper mode of proceeding was by reference to arbitration under the twenty-eighth rule. The

the industrious classes, for the purpose of raising by small periodical subscriptions, a fund to assist the members thereof in obtaining a small freehold or leasehold property, and it is expedient to afford encouragement and protection to such societies, and the property obtained therewith: Be it enacted, &c., That it shall and may be lawful for any number of persons in Great Britain and Ireland to form themselves into and establish societies, for the purpose of raising, by the monthly or other subscriptions of the several members of such societies, shares not exceeding the value of £150 for each share, and such subscriptions not to exceed in the whole 20s. per month for each share, a stock or fund for the purpose of enabling each member thereof to receive out of the funds of such society the amount or value of his or her share or shares therein, to erect or purchase one or more dwelling-house or dwelling-houses, or other real or leasehold estate, to be secured by way of mortgage to such society, until the amount or value of his or her shares shall have been fully repaid to such society with the interest thereon, and all fines and other payments incurred in respect thereof, and to and for the several members of such society from time to time to assemble

together, and to make, ordain, and constitute such proper and wholesome rules and regulations for the government and guidance of the same, as to the major part of the members of such society so assembled together shall seem meet, so as such rules shall not be repugnant to the express provisions of this act and to the general laws of the realm, and to impose and inflict such reasonable fines, penalties, and forfeitures, upon the several members of any such society who shall offend against any such rules, as the members may think fit, to be respectively paid to such uses, for the benefit of such society, as such society by such rules shall direct; and also from time to time to alter and amend such rules as occasion shall require, or annul or repeal the same, and to make new rules in lieu thereof, under such restrictions as are in this act contained; provided that no member shall receive or be entitled to receive from the funds of such society, any interest or dividend by way of annual or other periodical profit, upon any shares in such society, until the amount or value of his or her share shall have been realised, except on the withdrawal of such member, according to the rules of such society then in force."

learned judge overruled the objections, and directed a verdict for the plaintiffs.

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J. Brown now moved for a rule nisi to set aside the verdict, and for a new trial, on the ground of misdirection.—The certified “rules and regulations” shew that the purposes of the society are not limited to those mentioned in the 6 & 7 Will. 4, c. 32, for the regulation of benefit building societies. Though one of the objects of the association is to enable members to receive out of the funds of the society the amount of his shares to erect or purchase houses or land, yet another object is to lend money to members on mortgage, without regard to the purpose to which it may be applied. Such an object was never contemplated by the statute. The eighth rule provides, that, so often as the funds of the association shall amount to a share of £120, the share shall be awarded to the highest bidder, who shall have the privilege of taking as many additional shares at the same rate as he may choose. [*Parke, B.*—The intention of the legislature was not to allow any one member to acquire a larger interest than £150 in respect of his share or shares. But that objection does not seem to have been taken at the trial.] By the eleventh rule, where any member shall have been awarded his share, he is to give notice to the secretary of the situation of the premises intended to be offered for security, and when the committee shall be satisfied that the premises so to be offered are a sufficient security to the association, they shall direct the trustees to pay to such member the sum of money which he shall be entitled to receive on executing a mortgage of the premises. These societies are exempt from the penalties of usury, and also from the charges of stamp-duty; but the legislature could never have intended that these exemptions should apply to loans to members at usurious interest. If so, a person who wished to borrow money on mortgage might avoid the payment of stamp-duty by becoming a member of one of these

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societies. [*Parke, B.*—There is no usury in benefit societies lending to their members money at more than £5 per cent. : *Silver v. Barnes (a).*]

The defendant is entitled to a verdict on the issue raised by the thirteenth plea. Though a meeting was held, and the approbation of the majority of the members then present obtained before the action was commenced, yet the meeting was not a special meeting as required by the rule, but a "special general meeting." [*Alderson, B.*—The meaning of a special meeting is, that the meeting shall not be convened unless the parties have notice of the purpose of meeting. A meeting may be both general and special—general for the purpose of doing general business, and special for a particular purpose, then it becomes a special general meeting. *Rolfe, B.*—A special general meeting is both special and general.]

The issue raised by the fourteenth plea ought also to have been found for the defendant. *Crisp v. Bunbury (b)* decided, that, since the 9 Geo. 4, c. 92, an action will not lie against the trustees of a benefit society, and that, in the case of disputes, the only mode of proceeding is by arbitration. This case differs from that of a private agreement to refer, since these rules are made under and have the force of an act of Parliament. The 6 & 7 Will. 4, c. 32, incorporates the provisions of the Friendly Societies' Act, 10 Geo. 4, c. 56, the 27th section of which requires the rules of every such society to provide for reference of disputes to arbitration. [*Parke, B.*—This rule contains no provision for enforcing the award in case of non-payment of the money.]

POLLOCK, C. B.—There ought to be no rule. If, at the trial, it had been objected that the society was not within the act, because it enabled members to hold an unlimited number of shares, each of which might be the maximum share, and consequently one member might have in him-

(a) 6 Bing. N. C. 180; 8 Scott, 300.

(b) 8 Bing. 394.

self the whole interest in the society,—if that objection had been raised, the Court would probably have taken time to consider the construction of the act. But the objection taken was, that the society could not lend money on mortgage to its own members. It is conceded that the society might lend money to persons not members; and I have looked into the act of Parliament, to see whether it contains any provision excluding loans to members, but I find none. If, then, the society may lend to strangers, I see no reason why they should not lend to any of their own body; on the contrary, it is quite within the scope of the society. With respect to the second objection, the answer has been already given by my Brother *Alderson*. By a special meeting is meant a meeting for those matters of which the parties have had special notice. Here they had notice of the purpose of the meeting, which was held for that and also for other purposes. As to the last objection, the 28th rule does not make it imperative to refer a matter of this kind to arbitration. That rule applies only to differences in respect of the construction of the rule, or any additions, alterations, or amendments therein.

PARKE, B.—I agree with the Lord Chief Baron. There is nothing in the act of Parliament to prevent the society from purchasing from its members the fee-simple of an estate; then why may they not take a mortgage of the estate? With respect to the question as to the number of shares that any one member may hold, that point does not appear to have been taken at the trial, and therefore does not arise now. As to the second objection, the answer has been already given. With respect to the last, the 28th rule applies only to disputes respecting the construction of the rules; and an action on a covenant is not a matter in dispute to be referred in pursuance of that rule.

ALDERSON, B.—I am of the same opinion. The point as

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to the number of shares which one member may hold was not taken; if it had been, I should have desired time to consider whether the meaning of the act is not that each member is to have an interest to the extent of £150 and no more, whether in one or more shares. With respect to the other objection, there is no ground for saying that this is a matter to be referred to arbitration.

Rule refused.

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RAMSBOTTOM v. DUCKWORTH and LILBURN.

A chapel-rate was laid on the landholders of the chapelry only, exclusively of the holders and occupiers of mills and houses:—*Held*, that an occupier of land within the chapelry, who did not object to the rate before the justices when summoned for non-payment, could not question its validity in an action of replevin, after distress on his goods under the justices' warrant.

A chapel-rate, duly made, but objected to from extrinsic circumstances, can only be questioned in the ecclesiastical court.

An order of justices for payment of chapel-rate need not state that the proceedings were taken "on oath."

THE following case was stated for the opinion of this Court.—This was an action of replevin, brought in the Common Pleas at Lancaster. The declaration stated, that the defendants took the goods, &c. of the plaintiff, and detained the same, against sureties, &c. The defendant Lilburn avowed, and the other defendant, as bailiff of Lilburn, acknowledged the taking &c., because they said, that the plaintiff, before the said time when &c., being an occupier of lands within the parochial chapelry hereinafter mentioned, and also an inhabitant thereof, and liable to be rated to the chapel-rate thereafter mentioned, was duly rated to a parochial chapel-rate in respect of the parochial chapel of Edenfield, within the parish of Bury, in the county of Lancaster, in a sum not exceeding £10, to wit, 1s. 7d., of all which the plaintiff had due notice; and that the defendant Duckworth, being chapel-warden of the chapelry, and authorised to demand and receive the said rate, duly demanded from the plaintiff the said sum, which the plaintiff neglected and refused to pay; and thereupon, neither the validity of the rates, nor the plaintiff's liability to pay the said sum at which he was rated having been questioned, and no notice

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of any intention to question the same having been given to the defendant Duckworth, he the defendant Duckworth, as such chapel-warden, and so authorised to demand and receive the said rate, gave information and made complaint of the premises in due form of law, in writing and on oath, to one of her Majesty's justices of the peace for the said county, to wit, the Rev. W. Gray, clerk, and not being patron of the chapel, nor in any way interested therein; upon which information and complaint the said justice made and issued his warrant in writing, under his hand and seal, directed to certain persons, and commanding them forthwith to summon the plaintiff to appear before two of her Majesty's justices of the peace for the said county, to wit, the Rev. W. Gray, clerk, and W. Turner, Esq., on the 28th day of March, A.D. 1845, to answer to the said information and complaint, and to be further dealt with according to law. That the plaintiff had due notice of the premises, and was duly summoned under and according to the said warrant to appear and answer as aforesaid, and duly appeared before the justices according to the exigency of the said warrant, and shewed no cause for the non-payment of the said sum, and the said justices duly considered the premises, and examined upon oath into the merits of the said information and complaint, and duly found and adjudged that the said sum was justly due from the plaintiff to the defendant Duckworth, as such chapel-warden; and thereupon the said justices then made and issued an order in writing under their hands and seals, and thereby ordered and directed that the plaintiff should pay the defendant Duckworth, as such chapel-warden as aforesaid, the said sum of 1*s.* 7*d.*, and also 13*s.* 6*d.*, the reasonable costs and charges of the defendant Duckworth, which sums amounted together to 15*s.* 1*d.*, of all which premises the plaintiff had due notice, and was required to pay according to such order, but neglected and refused to do so: that neither the validity of the rate, nor the liability of the plaintiff to pay the said sum at which he was rated,

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had been in any manner questioned ; that due proof upon oath was afterwards given before the said justices of such neglect and refusal : that thereupon the justices duly made and issued their warrant in writing under their hands and seals, and thereby commanded the persons to whom it was addressed forthwith to levy the said sum of 15*s.* 1*d.* by distress and sale of the goods, &c. of the plaintiff, and out of the money arising from such sale to pay unto the defendant Duckworth the said sum of 15*s.* 1*d.* That the said warrant was delivered to the defendant Lilburn, a person authorised to execute the same ; that afterwards the said defendant, under and in execution of the same, and the other defendant in his aid and assistance, and as his bailiff, took the said goods, and detained &c., and which are the same taking and detaining in the declaration mentioned, &c. To this the defendant pleaded in bar, *de injuriâ*, on which issue was joined.

At the trial before *Coleridge, J.*, at the last assizes at Liverpool, it appeared that Edenfield was situate within the parish of Bury, in Lancashire, and was a parochial chapelry, having immemorially a chapel and chapel yard, chapel bell, and baptismal font, with rights of burial and of administering the sacrament by the incumbent of the chapelry ; also a chapel-warden and a sidesman, and chapel-rates distinct from the church-rates of the parish ; that it also formerly contributed to the church-rates of the parish in the proportion of one-fourth of the church-rate, which sum was raised by the separate chapel-rates laid in the vestry of the chapelry, but for many years the chapelry has not contributed to the church-rates of the parish. That the chapel-rates were for many years laid in the same way as the rate hereinafter mentioned, and were collected by the chapel-wardens of the chapelry, and were usually laid annually, and for the same amount as the rate in question. That the incumbent of the chapelry was a perpetual curate, and that the curacy had been augmented by the governors

of Queen Anne's bounty. That on the 12th September, 1844, after due notice, the following alleged rate was laid, in the usual form and without any opposition, in the vestry of the chapelry :—

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"We, the minister, chapel-wardens, and other landholders, within the chapelry of Edenfield, in the parish of Bury, in the county of Lancaster and diocese of Chester, whose names are hereunto subscribed, do hereby, this 12th day of September, in the year 1844, at our meeting in the vestry of Edenfield chapel, for that purpose assembled pursuant to public notice, rate and tax *all and every the landholders within the chapelry* aforesaid hereinafter mentioned, for and towards the necessary repairs and expenses of the said chapel for the current year; the several sums hereinafter specified being at the rate of 4½d. in the pound upon the valuation, according to which the sittings within the said chapel were originally allotted and appropriated.

"(Signed) LAWRENCE DUCKWORTH, THOMAS CLARKE.
JOHN HAWORTH, MATTHEW WILSON,
JAMES MERCER, Chairman."

Then followed a great number of names under the following heading :—

Occupier.	Place of Abode.	Description of Property.	Valuation.	Rate.
Amongst them was				
J. Ramsbottom	Hacit	Land	4l. 5s. 5d.	1s. 7d.

The Reverend Matthew Wilson, whose name is mentioned in the rate as chairman, who with Duckworth and others signed the above rate, was the incumbent of the chapelry, and was the chairman at that vestry meeting. Lawrence Duckworth, therein also mentioned, was the

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chapel-warden. The others whose names are mentioned as having subscribed the rate were inhabitants and holders and occupiers of land in the chapelry; and the persons whose names followed the heading above mentioned were also inhabitants and holders and occupiers of land within the chapelry, and amongst these the said J. Ramsbottom, the above-mentioned plaintiff, and the above sum of 1*s.* 7*d.* is the sum at which he is rated.

The rate (so called) in question was made upon an old valuation upon the occupiers of land popularly so called. Thus, it was laid on land including a farm-house, if any, or on a house and garden; but it does not include any mills, dwelling-houses, or other buildings when without land. Thus, the occupier of a mill and farm was rated for the latter only in it. There are now a great number of mills, dwelling-houses, and other buildings in the chapelry. The occupiers so rated are allowed to have seats as of right in the chapel. At one time, subsequent to 1777, and for several years, the occupiers of old mills were rated in respect thereof, and they having complained that the new mills were not included in the rate, or rated, a rate, about ten years before action brought, was made, charging all the property in the chapelry; but this was done for one year only, and afterwards the old valuation was recurred to, and the rates laid exclusively upon the occupiers of land therein, excepting all mills, as well the old mills formerly rated as the new, and all other buildings without land.

The rate was paid by all the parties rated except the plaintiff. The defendant Duckworth, being chapel-warden, afterwards demanded the above sum from the plaintiff, who refused to pay it, and, in consequence, Duckworth, on the 27th of March, 1845, laid an information and complaint on oath before the Rev. Wm. Gray, a magistrate of the county of Lancaster. On that Mr. Gray granted his warrant, under his hand and seal, to summon the plaintiff

to appear on Friday, the 28th of March, 1845, to answer that information. In pursuance of that warrant, the plaintiff, having been duly summoned, appeared on the day appointed before the Rev. William Gray and William Turner, Esq., another magistrate of the county, on which occasion he did not in any way object to the validity of the rate in question, but only to the validity of all church-rates upon Dissenters; and thereupon the magistrates, having examined on oath into the merits of the said complaint, made an order under their hands and seals, directing the payment of the same sum of 1*s.* 7*d.* over and above reasonable costs and charges, which they have ascertained at 13*s.* 6*d.*, which order is as follows:—

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“Lancashire, to wit.—Whereas information and complaint have been made unto the Rev. William Gray, clerk, one of her Majesty’s justices of the peace in and for the said county of Lancaster, by Lawrence Duckworth, the chapel-warden of the chapel and chapelry of Edenfield, in the said county, that John Ramsbottom, of the chapelry of Edenfield aforesaid, hath refused and neglected, and still doth refuse and neglect, to pay him the said Lawrence Duckworth (such chapel-warden as aforesaid), or any person authorised to receive the same, the sum to which the said John Ramsbottom is duly rated and assessed in the church-warden’s rate for chapel rates, and made the 12th day of September last (and which sum does not exceed the sum of ten pounds, being the sum of 1*s.* 7*d.*) the validity of which rate hath not been questioned in any ecclesiastical court, and which sum is now justly due from the said John Ramsbottom to him the said Lawrence Duckworth, as such chapel-warden as aforesaid. And whereas, by warrant under the hand and seal of the said William Gray, so being such justice as aforesaid, the said John Ramsbottom hath been duly summoned and convened before us, the Rev. William Gray, clerk, and William Turner, Esq., two of her

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Majesty's justices of the peace in and for the said county where the said chapel is situate in respect of which such rate hath been made, and being neither of us patron of the said chapel, nor any way interested in any of the rights, dues, or other payments belonging to the said chapel. And whereas the said John Ramsbottom, being so summoned and convened before us, at the Sessions Room in Haslingden, in the said county, on this present Friday, the 28th day of March, 1845, now appears accordingly, we, the said justices, therefore, having considered the premises, and having also duly examined into the merits and truth of the said complaint, do find that there is justly due the aforesaid sum of 1*s.* 7*d.* from the said John Ramsbottom to the said Lawrence Duckworth as such chapel-warden as aforesaid, and do order and direct the said John Ramsbottom to pay or cause to be paid the same unto the said Lawrence Duckworth, together with the further sum of 13*s.* 6*d.* for such costs and charges concerning the premises as upon the merits of the case do appear to us to be just and reasonable. Given under our hands and seals at Haslingden aforesaid, the 28th of March, 1845.

" WILLIAM GRAY (L. S.)

" WILLIAM TURNER (L. S.)"

This order having been served on the plaintiff, and he having refused to pay according to it, and this being proved before the same magistrates, they, on the 18th of April, 1845, made a warrant under their hands and seals to levy the money so ordered to be paid, together with the amount of the costs and charges, by distress and sale of the goods of the plaintiff. Under that warrant the goods of the plaintiff were taken and detained, as alleged in the declaration. The validity of the rate had never been questioned in the ecclesiastical court.

At the trial, it was objected that the rate was void, being

laid on the landholders of the chapelry only, exclusively of the holders and occupiers of mills and houses; also, that the order did not state that the magistrates had examined upon oath. Upon these objections a verdict was taken by his Lordship for the defendants, but leave was reserved to the plaintiff to move to enter a verdict for him, damages 3*l.* 3*s.*

The questions for the opinion of the Court are, whether, upon the objections before stated, the verdict shall be for the plaintiff or for the defendants; and if the Court should be of opinion that the verdict should be for the plaintiff, then the verdict as entered is to be set aside, and a verdict entered for the plaintiff, with 3*l.* 3*s.* damages.

Martin, for the plaintiff.—First, the rate is void, being laid on the landholders of the chapelry only, and excluding the holders and occupiers of mills and houses. All the authorities concur in stating that a church-rate must be made in respect of the whole parish or district. In Burn's Ecclesiastical Law, tit. Church-rate (*a*), and also in Burn's Justice, tit. Church or Chapel (*b*), it is said, "If a parish plead a custom for it to be laid only for lands and not for houses, or to be laid only for arable lands, and to be excused for their pastures, or to be laid only for their sheepwalks and not for the rest, the custom cannot be good; for by the law all lands and houses are to be equally rated; and their paying for some part can be no good cause for the discharge of the rest." For that position the case of *Andrews v. Hutton*, reported in Hetley (*c*), is cited, and also an anonymous case in Latch (*d*). The former report is thus:—"Hutton, farmer of a manor, Andrews, and other churchwardens, libels against him for a tax for the reparation of the church. *Henden* moved for a prohibition, because that first libel was

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(*a*) Vol. 1, p. 381, 9th ed.

(*b*) Vol. 1, p. 644, 29th ed.

(*c*) Page 130.

(*d*) Page 303.

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upon a custom that the lands should be charged for reparations, which custom ought to be tried at the common law. And, secondly, he said that the custom of that place is, that houses and arable lands should be taxed only for the reparations of the church, and meadow and pasture should be charged with other taxes. But the whole court on the contrary; first, that although a libel is by a custom, yet the other lands shall be dischargeable by the common law. But the usage is to allege a custom, and also that houses are chargeable to the reparations of the church as well as land; and, thirdly, that a custom to discharge some lands is not good; wherefore a prohibition was granted." This rate not having been duly made, its validity may be disputed in the present form of action. In Rogers's Ecclesiastical Law, tit. "Church-rate" (a), it is said, "If a ratepayer wishes to dispute the validity of a rate, or the amount of his assessment, he should, in the first instance, as a matter of precaution, attend at the vestry and state his objections, if he has an opportunity of so doing: if he has not, or if he has and his objections are not removed, he may either enter a caveat against the confirmation of the rate, which seems to be the mode when the rate is generally unequal (b); or he may refuse to pay his assessment, and then, if proceeded against in the ecclesiastical court in order to enforce payment in a suit for subtraction of rate, he may, as a matter of defence, shew that the rate was illegally made, or that he has been over-rated" (c). In the case of *White v. Beard* (d), which was a suit for subtraction of church-rate, Dr. *Lushington*, in delivering judgment, says: "Now, looking at the authorities on this question, it appears in a previous case to have been determined that the ecclesiastical court has not jurisdiction in any original proceeding by a ratepayer to set aside a rate

(a) Page 996.
 (b) 3 Phill. 648.

(c) 4 Hag. 87; 3 Phill. 645.
 (d) 2 Curteis, 496.

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on the ground of inequality in the assessment; for the remedy of the party unequally assessed is to enter a caveat against the confirmation, or to refuse payment of the rate." This is the doctrine laid down in the case of *Watney v. Lambert* (a), by Sir John Nicholl, and the necessary inference from this doctrine is, that it is out of the power of any parishioner to bring a rate under the consideration of this Court on the ground of erroneous confirmation, and, consequently, the party has no remedy except by resistance to the rate, because in an objection to the confirmation of a rate I cannot administer any remedy, since it has been decided by the same authority that a rate may be sued for and enforced, notwithstanding no confirmation has taken place (b). [*Alderson*, B.—Under the 53 Geo. 3, c. 127, s. 7, the justices have no power to interfere, except where there is no dispute as to the validity of the rate. Here the plaintiff has omitted to dispute the rate at the proper time, and he cannot now dispute it in this action.] That statute only gives a more easy mode of collecting church-rate, where the validity of the rate is not disputed. After reciting, that "it is expedient that church-rates or chapel-rates of limited amount unduly refused or withheld, should, in certain cases, be more easily and speedily recovered," it enacts that "if any one duly rated to a church-rate or chapel-rate, the validity whereof has not been questioned in any ecclesiastical court, shall refuse or neglect to pay the sum at which he is rated," the justices may direct the payment, if under £10: provided "that nothing therein contained shall extend to alter or interfere with the jurisdiction of the ecclesiastical court to hear and determine causes touching the validity of any church-rate or chapel-rate, or from proceeding to enforce the payment of such rate, if the same shall exceed the sum of £10, from the party proceeded against." [*Alderson*, B.—It is clear that a rate may be disputed in the ecclesiasti-

(a) 4 Hagg. E. R. 84.

(b) *Knight v. Littlejohns*, 3 Add. 53.

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cal court for inequality. Dr. *Lushington*, in his judgment in *White v. Beard*, means simply this: that there cannot be a suit in the ecclesiastical court to set aside an unequal rate; but if, in a suit in that court, a rate be proved to be unequal, the party may free himself from liability to pay it. In the case of *White v. Beard*, the defendant would not have been admitted to plead an article which, if proved, would be of no value. A party cannot appeal against a rate because it is unequal, but he may refuse to pay it.] The term "duly rated," means legally and properly rated. There is no authority to shew that a party who omits to give notice to the justices that he disputes the rate, is estopped from afterwards questioning it on the ground of inequality. In Burn's Justice, tit. "Church or Chapel" (a), it is said, "Unless the rate be wholly a nullity, and void, its legality cannot be disputed in an action for levying it under a distress authorised by a magistrate's warrant." There is no valid distinction between a void rate and an illegal rate.

Secondly, the 53 Geo. 3, c. 127, s. 7, requires the justices to examine "*upon oath*" into the merits of the complaint; but the order does not state that the complaint was made on oath, or that the plaintiff's refusal to pay the rate was proved on oath. [*Alderson*, B.—That point was determined in *Ormerod v. Chadwick* (b).]

Cowling, contra.—The validity of the rate cannot be questioned in this Court. The statute of "*circumspecte agatis*," (13 Edw. 1, stat. 4), prohibits a common-law court from interfering with matters purely spiritual. The language of that act has been construed to apply to repairs of the church; 2 Inst. 489. In Gibson's Codex, p. 195, it is said, "The cognizance of rates made for the reparation of churches and church-yards belongs to the spiritual court. This is in consequence of the foregoing statute, 13 Edw. 1,

(a) Page 653.

(b) 16 M. & W. 367.

concerning repairs as of spiritual cognizance, inasmuch as the right of judging of rates, and the enforcing of them, is of absolute necessity to render the statute effectual; and therefore by that tenor of the writ the whole concern is declared to belong to the spiritual court." Also, in Rogers's Ecclesiastical Law, tit. Church-rate (*a*), it is laid down, that the ecclesiastical courts have the exclusive power of deciding on the validity of the rate, or the liability of the person to pay it.

With respect to the objection, that it is not shewn that the proceedings were taken on oath, the Court will infer that the justices who had jurisdiction have acted in conformity with it: *Groenvelt v. Burnell* (*b*). An order differs from a conviction in this respect, that in the former no statement need be made that the proceedings were on oath. *Ormerod v. Chadwick* is an express authority to that effect. It will not be assumed that the justices acted without jurisdiction, because they have omitted to state that the proceedings were taken on oath.

Martin replied.

POLLOCK, C. B.—With respect to the objection that the rate is void, being laid on the landholders of the chapelry only, and exclusively of the holders and occupiers of mills and houses, I think it sufficiently appears that the rate was *duly* made; that is, made by competent authority, and if not objected to, capable of being enforced. As the plaintiff made no objection to the rate when summoned before the justices, he cannot now question it in this action. It might as well be said, that, after judgment recovered, an inquiry could be made as to the foundation of the judgment.

With respect to the other objection, we will take time to

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(*a*) Page 996.

(*b*) Holt, 536; 1 Ld. Raym. 213.

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look into the case of *Ormerod v. Chadwick*, and see whether we are bound by that decision.

ALDERSON, B.—I am of the same opinion. It seems to me that a rate *duly* made, within the meaning of the 53 Geo. 3, c. 127, s. 7, is a rate valid on the face of it, and which has not been disputed before the justices, or in the ecclesiastical court. The words of that act are satisfied if the rate, on the face of it, and without extraneous circumstances, would be a valid rate. In order to invalidate the rate by extraneous circumstances, the party must go to the ecclesiastical court; those circumstances cannot be investigated here. I do not mean to say that a rate made upon half the property, or excluding mills, would be a rate duly made, but only that in this form of action the party has no right to go into an objection which requires proof of extraneous circumstances.

ROLFE, B.—I will only add one observation, with regard to the words “duly made.” A rate is duly made if made in such a manner that the magistrates are bound to act. It would be a great absurdity if the magistrates could be compelled by mandamus to enforce the rate, and yet parol evidence could be given to dispute the rate if they did act.

Cur. adv. vult.

POLLOCK, C. B., on a subsequent day, said, that the Court had looked into the case of *Ormerod v. Chadwick*, and were of opinion that the present case fell within the principle of that decision, consequently the verdict for the defendants must stand.

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DEBT for work and labour, as the factor and agent of the defendants, and for commission due and payable in respect thereof.

Pleas: *nunquam indebitatus*, payment, and set-off.

At the trial, before *Rolfe*, B., at the Liverpool Spring Assizes, 1847, it appeared that the plaintiff had been for many years in the employ of the defendants, as captain and supercargo in the African trade, and the matter in dispute was whether, under the following document, the plaintiff was entitled to a commission of £6 per cent. on the proceeds of the actual sale of a homeward cargo of palm-oil, without any deduction in respect of bad debts arising from the failure of parties to whom portions of the oil had been sold.

“Liverpool, February 3, 1845.

“Captain Charles Caine,

“Your commissions are £6 per cent. on the net proceeds of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz. £4 per ton from the gross sales of the oil when taken from the quay, and 4*l.* 15*s.* when warehoused. No commissions allowed on watered oil.

“We are, &c.,

“CHARLES HORSFALL & SON.”

There was evidence that, in ordinary mercantile language, “net proceeds” meant proceeds exclusive of bad debts.

The learned judge was of opinion that the defendants were entitled to deduct losses sustained by reason of bad debts, on certain sales of portions of the cargo, before the plaintiff was entitled to his commission, and it appearing that on such construction the plaintiff had been fully paid,

The following letter was addressed to an African captain and supercargo by his employers:—“Your commissions are £6 per cent. on the *net proceeds* of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz. £4 per ton from the gross sales of the oil when taken from the quay, and 4*l.* 15*s.* when warehoused:”—*Held*, that the commission was payable only on the sums actually realised, after deducting bad debts as well as other charges.

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his Lordship directed a nonsuit, reserving liberty for the plaintiff to move to enter a verdict for £370, if the Court should put a different construction on the document.

A rule nisi having been obtained accordingly,

W. H. Watson and *Forsyth* now shewed cause.—The term “net proceeds” must be construed according to its ordinary signification, that is, the amount actually realised. Bad debts cannot be taken as part of the proceeds of the cargo. The plaintiff is not entitled to any commission until after the sale, and if the cargo were accidentally destroyed by fire, or otherwise damaged between the time of the landing and sale, the plaintiff would bear his proportion of the loss. [*Parke, B.*—Are not the “net proceeds” to be the gross sale minus the £4 to be deducted in the one case, and the 4*l.* 15*s.* in the other? If the words “net proceeds” had stood alone, there would have been great weight in your argument. *Pollock, C. B.*—The words “net proceeds” must have some meaning different from “gross sale,” otherwise the document would be the same if they were struck out.] The meaning is, that the plaintiff is to share every risk to which the cargo is subject, including bad debts. [*Alderson, B.*—In order to find the “net proceeds” of the cargo, are not the usual charges to be deducted from the gross sale?] According to that construction, the commission of £6 per cent. would be payable on the gross sale; but if the parties had so intended, the document would have been worded accordingly. The words “after deducting the usual charges” are not meant as the measure of the “net proceeds,” but the true construction is, that the plaintiff shall have £6 per cent. upon whatever is actually realised, but the amount which shall be deducted from the gross sale is the £4 per ton when taken from the quay, and 4*l.* 15*s.* when warehoused. Suppose a fraudulent purchase of part of the cargo by a person never intending to pay for it, in which case, according to

the authority of *Load v. Green* (a), the vendor might maintain trover and revest himself with the goods; if, in the meantime, the price fell £50 per cent., and the cargo was afterwards sold, could it be contended that the plaintiff was entitled to commission on the amount of the first sale? If the defendants are not bound to pay the £6 per cent. upon a nominal contract of sale, but only upon the actual proceeds, it is reasonable that they should be allowed to deduct bad debts. The term "net proceeds" is constantly used as synonymous with "profits:" "Story on Partnership," p. 62, The plaintiff trusts to the care and prudence of his employers in making the sales, and he cannot sustain any loss, though in some cases he might not get much profit.

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Martin and Cowling, in support of the rule.—The captain has discharged his duty by procuring a cargo of oil and bringing it to the port of Liverpool, to be used in any way the owners may think proper. His commission is to be assessed on the value of his services, which are tested by the value of the cargo. It could never have been intended that he should be deprived of compensation by bad debts arising from sales over which he has no control. [*Parke, B.*—You say that the plaintiff is entitled to £6 per cent. upon the gross sale after deducting the usual charges; then, upon that construction, unless brokerage is included in the usual charges, the captain would receive £6 per cent. upon the gross proceeds, including brokerage.] The amount of the gross sales must first be taken, from that the usual charges are to be deducted, and the £6 per cent. is to be calculated on the residue. The deductions are not to be made from the gross proceeds, but from the gross sales. According to the other construction, the supercargo would become a del credere broker, without having any opportunity of selling the goods.

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POLLOCK, C. B.—The rule must be discharged. In construing an act of Parliament, a deed, or a contract, we ought to read the words in their ordinary sense, and not depart from it, unless it is perfectly clear from the context that a different sense ought to be put on them. This document is an agreement for £6 per cent. on the “net proceeds” of a homeward cargo, after deducting the usual charges, viz. a certain sum per ton from the gross sales thereof when taken from the quay, and certain other sums when warehoused. The question then is, what is the meaning of the term “net proceeds?” If any doubt could be entertained, it is removed by the evidence given at the trial, that “net proceeds,” in mercantile language, means the sum actually received after making all deductions. When the rule was moved for, it was contended that, upon the true construction of the contract, the words “after deducting the usual charges &c., viz. £4 per ton from the gross sales of the oil when taken from the quay, and 4*l.* 15*s.* when warehoused,” really made the expression “net proceeds” the same as if it had been “gross sales,” and that the document must be read thus:—“Your commissions are £6 per cent., that is to say, upon the net proceeds of your homeward cargo, after deducting from the gross sales the usual charges of £4 and 4*l.* 15*s.*” But why should we so read it? The term “net proceeds” must have the same meaning as in ordinary mercantile language, viz. the sum actually received after making all deductions. The construction of the document may receive some light by beginning the sentence thus:—“After deducting the usual charges as arranged by the African Association, viz. £4 and 4*l.* 15*s.* per ton from the gross sales, your commissions are £6 per cent. on the net proceeds of your homeward cargo.” If the document be so read, there appears to me little or no difficulty; and the term “net proceeds” would receive the construction which is ordinarily put upon it. This is a contract to receive £6 per

cent. on the net proceeds, with a stipulation for deducting the usual charges as arranged by the African Association. As to its being a hard bargain, that cannot make any difference in the construction of the document; but I do not see the hardship. If the captain gets nothing for his labour, the owner gets nothing by the whole adventure; and what hardship is there in saying that the captain is to be paid by commission upon the amount received by the owner? Then, it is said that the captain has no control over the sale; but the answer is, that the owner has so large an interest in proportion to that of the captain, that the latter may safely trust the owner with the sale. It appears to me a very clear case, and that the rule ought to be discharged.

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PARKE, B.—I concur in opinion that this rule should be discharged, though certainly during the argument I entertained considerable doubt, and I cannot say that it is now entirely removed; but, upon the whole, I think the best course for us to pursue is to take the true meaning of the term “net proceeds” to be the sum of money which comes to the pocket of the owner of the cargo. There is nothing unreasonable in such a construction. First, it is said that the captain has no control over the sale, and that it is a hardship on him, after his labour in procuring a cargo, to be at the mercy of the owner. The answer to that is, that the captain may well trust the owner of the cargo to make the best possible bargain in selling it, seeing that ninety-four parts belong to the owner, and only six to the captain. There is, therefore, nothing unreasonable in a contract by which the captain is to be paid according to the “net proceeds;” that is, the sum actually received by the owner. The question then is, whether a different meaning is to be put upon the term by reason of the context. Now, the words of the contract are: “Your commissions are £6 per cent. on the net proceeds of your homeward cargo, after deducting the usual charges, as arranged by the African

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Association" &c., "from the gross sales." It is argued that the context was intended to explain the meaning of the term "net proceeds" to be the gross amount of sales, after deducting so much per ton. But since it is admitted that the £4 and 4l. 15s. per ton from the gross sales do not include the expenses of removing the cargo from the ship nor commission on the sales, if that construction be put upon the term, the result would be that the owner would have to pay the £6 per cent. on such expenses and commission, as well as on the sum he actually received. It cannot be supposed that he would stipulate to pay £6 per cent. on the sum paid to the broker. On the other hand, if we interpret the term "net proceeds" to mean the proceeds in cash, after deducting from the gross sales the charges of so much per ton, and other usual charges, the meaning would be, that the captain is to have £6 per cent. on the net proceeds of the cargo, after deducting those charges only. There is certainly some difficulty in the construction contended for on behalf of the defendants, but, upon the whole, I think it best to give the term its ordinary meaning, so that the contract will be £6 per cent. on the sum *which comes to hand*, after deducting from the gross sales not only the £4 and 4l. 15s. per ton for port-charges and other things, as arranged by the African Association, but also the usual charges for brokerage, &c. Since, therefore, the plaintiff is only entitled to receive £6 per cent. on the money which has come to the pocket of the defendants, my Brother Rolfe was right in directing a nonsuit.

ROLFE, B.—I am of the same opinion, though I confess I had some doubt in the course of the argument whether I took a right view at the trial. The term "net proceeds," in mercantile language, means the sum actually received after making all deductions; therefore the plaintiff, being entitled by this contract to £6 per cent. on the "net proceeds," has been fully paid, if that term here means the sum actually received by the owner; but the plaintiff has

not been paid if it means something beyond the amount actually received from the gross sales. The question, then, is, whether the term "net proceeds," in the contract, means something different from its ordinary acceptance. Perhaps it might have been intended that the commission should be payable on the gross sales, after deducting the usual charges. Yet the language of the letter is consistent with the ordinary meaning of the term; and there is nothing in the nature of the contract which seems to lead to the one conclusion rather than the other. There is no hardship in construing this letter as a contract to pay £6 per cent. on the sum actually realised by the merchant; for it is perfectly obvious that he would take due pains to recover his 94 per cent. of the cargo. The only conclusion which I can come to is, that the term "net proceeds" must receive its plain and ascertained meaning as used in ordinary mercantile language, and that was shewn by evidence in the cause.

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ALDERSON, B.—I have not heard the whole of the argument, but I concur in thinking that the rule should be discharged. The term "net proceeds" must be construed to mean the sum actually realised by the sale of the cargo; the second part of the contract being an arrangement between the parties, that a certain portion of the charges shall be deducted from the gross sales. Unless that construction be put upon the document, this absurdity would follow,—that there would be included in the net proceeds certain charges, and, amongst others, brokerage; so that, after deducting the usual charges as arranged by the African Association, the plaintiff would receive commission upon something not being net proceeds. It must mean, after deducting the charges as arranged by the Association, and also the other usual costs and charges of the sale in the ordinary way, and, according to the evidence at the trial, one of the usual charges is bad debts.

Rule discharged.

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Nov. 17.

DOE *d.* WILLIAM BURTON *v.* JOHN WHITE and Others.

A testator devised as follows:—"I give to my wife Nanny all that house, shop, and garden now in the tenure of B., for her own sole use and purpose, and I also give to my wife Nanny all that messuage, farm, and premises now in the holding of C., to hold to her, my said wife, during the term of her natural life, and from and after her decease I give and devise the said messuage or tenement, and also the said farm and premises, given to my said wife for her life as aforesaid, to my son John. I give and bequeath to my son George the lease of the farm I rented of Lord L., for

EJECTMENT to recover certain freehold and copyhold premises, in the parish of Hales Owen, in the county of Worcester. The cause came on for trial before *Gaselee*, Serjt., at the Worcester Summer Assizes, 1847, when, by consent, the jury found the following special verdict:—

Aaron White, late of Hales Owen, in the county of Worcester, being seised in fee of certain freehold and copyhold premises, duly made and published his will, bearing date the 17th day of July, 1820; the material parts of which are as follow:—"I give to my wife Nanny White all that house, shop, and garden now in the tenure of Benjamin Yates for her own sole use and purpose; and I also give to my wife Nanny White all that messuage, farm, and premises now in the holding of Mr. Chambers, situate at Cakemore, in that part of the parish of Hales Owen which lies in the county of Worcester, except the half-acre of land now lying in Upper Quinton Field, and now in the holding of my son George White, to hold to her my said wife during the term of her natural life; and from and after her decease, I give and devise the said messuage or tenement, and also the said farm and premises given to my said wife for her life as aforesaid, to my son John White, subject to the payment out of the aforesaid premises of the sum of £50 to be paid to my son George White, and also the

his own use and benefit; and I also give to my son George that one acre of copyhold land I bought of G., and also half an acre of freehold land adjoining that one acre of copyhold land." The will contained other devises, and at the end was this passage:—"And I give and bequeath and order the rents or interests that is behind, due, and unpaid shall go and be paid to that person I have left the *estates and properties* respectively to. As to all the rest, residue, and remainder of my property whatsoever, and of what nature or kind soever, I give, devise, and bequeath the same to be equally divided between and amongst my said wife Nanny and her children who have issues, share and share alike:"—*Held*, first, that a fee in the lands devised did not pass to George; for, though the word "estate," in the operative part of a will, passes not only the corpus of the property, but all the interest of the testator in it, unless controlled by the context, yet where that word is not used in the operative clause of the devise itself, but is introduced into another part of the will referring to it, such word cannot be construed as having the effect of extending the meaning of the operative clause, whether prior or subsequent.

Secondly, that the children of the wife who had no issue at the death of the testator did not take any interest under the residuary clause.

sum of £50 to my daughter Sally Powers. I give and bequeath to my son George White the lease of the farm I rented of Lord Lyttleton for his own use and benefit; and I also give to my son George White that one acre of copyhold land I bought of Counsellor Guest, lying and being in the uppermost Quinton Field, in the parish of Hales Owen; and also half an acre of freehold land adjoining that one acre of copyhold land, which I purchased of Martin and Horne, to my son George White; and also one more acre of copyhold land I bought of Counsellor Guest, lying and being in Horsenail Field, in the parish of Hales Owen, to George White, and now in his own occupation; and also those two half-acres of land lying in Horsenail Field to my son George White; and also that leasow of arable land, called the Top croft, containing four acres and a half, lying and being in Ridge Acre, in the parish of Hales Owen, to my son George White; and also those two dwelling-houses, shops, and gardens now in the occupation of Benjamin Clay and Thomas Haycock, to my son George White; and also three plecks of land or gardens that I inclosed from the waste, and purchased of the surveyor of the highways, Mr. Richard Block-sedge, to my son George White; and also that house, shop, and garden, with the appurtenants thereto belonging, situate in Long-lane, in the parish of Hales Owen, and now in the occupation of Samuel Partridge, unto my son George White and I also give and bequeath to my daughter, Sally Powers, those two dwelling-houses, shops, and gardens, with the appurtenances thereto belonging, situate in the parish of Hales Owen and county of Salop, and now in the tenure or occupation of J. Gould, to and for her own use, and to dispose of them as she may think proper amongst her children; and if she should die without disposing of the aforesaid property given to her, for it to go and be divided amongst her children, share and share alike I give and bequeath to my son, John White, all that farm or estate I bought of Mr. Bradley, of London, containing about twenty acres, situate

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at the Quinton, in the parish of Hales Owen And I give and bequeath and order the rents or interests that is behind, due and unpaid, shall go and be paid to that person I have left the estates and properties respectively to. As to all the rest, residue, and remainder of my property whatsoever, or of what nature or kind soever, I give, devise, and bequeath the same to be equally divided between and amongst my said wife Nanny White and her children who have issues, share and share alike."

Aaron White died on the 23rd day of May, 1822, leaving Nanny White, his widow, and four children him surviving, all of whom were then married, that is to say, Sally, the wife of T. Bowers; George White, the devisee in the said will mentioned; Lucy, the wife of W. Burton, and John White, one of the within-named defendants.

All the children except George White had issue living at the time of the death of Aaron White.

George White had issue between the death of Aaron White and the death of Nanny White, which issue are still living.

Nanny White made her will, duly signed and attested, dated 30th June, 1826, and thereby gave and devised all her property that she might have or be entitled to at the time of her death, to her daughters Sally Powers and Lucy Burton, to be equally divided between them, for their entire use and purpose, and to their heirs and assigns for ever.

Nanny White died in the month of January, 1829, without altering or revoking her said will.

George White was, in the year 1830, duly admitted, according to the custom of the manor of Warley Wigan, to the said two acres of copyhold land devised to him by the will of Aaron White, to hold for all such estate and interest that he took therein under the said will, according to the custom of the manor.

George White, by his will in writing, bearing date the 26th of June, 1840, and duly signed and attested for the passing of freehold estates, gave and devised all his real and personal

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estate whatsoever and wheresoever, unto his brother, the said John White, his heirs, executors, and administrators, upon certain trusts, for the benefit of his, the said George White's, two daughters. George White died in the month of July, 1840, without altering or revoking his said will.

Lucy Burton died intestate in the month of March, 1837, leaving William Burton, the lessor of the plaintiff, her eldest son and heir-at-law, her surviving; and the said William Burton, the husband of the said Lucy, died in the month of September, 1841.

After the death of George White, the defendant John White claimed to be entitled as devisee under the said will of the said George White, as tenant in fee-simple, to the whole of the freehold and copyhold premises devised by the said will of Aaron White to the said George White, and procured the attornments to him of the several tenants in possession of the said premises, and has continued to receive the whole of the rents thereof, and has refused to account for or pay over any part of such rents to the lessor of the plaintiff, and the said John White came in and defended this action of ejectment as landlord, under the usual landlord's rule for that purpose.

The other defendants, except the said John White, were, at the commencement of this action, and still are, the several tenants in possession of the said freehold and copyhold premises devised to the said George White, which premises they severally held as tenants from year to year to the said George White in his lifetime, and after his death attorned and paid rent to the defendant John White so claiming as aforesaid, and refused to pay rent to the lessor of the plaintiff, or to acknowledge him as landlord of any part of the said premises.

Upon the death of the said George White, the lessor of the plaintiff, William Burton, claimed as heir-at-law of his mother, Lucy Burton, to be entitled to one undivided fourth part, and also one undivided eighth part of and in the said freehold and copyhold lands and premises devised by the said

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will of Aaron White to the said George White, alleging that the said Lucy Burton was, at the time of her death, entitled to one undivided fourth part thereof, as tenant in common in fee under the will of her father, Aaron White, and to one undivided eighth part thereof as tenant in common in fee under the will of her mother, the said Nanny White. (The special verdict then stated lease, entry, and ouster, and concluded in the usual form.)

In this Term (Nov. 10) *Phipson* appeared to argue on behalf of the plaintiff; but the Court called on

Hodgson, for the defendant (*Whateley* with him).—First, George White took an estate in fee in the lands devised. Though the testator has bequeathed to George certain freehold and copyhold lands, without words of inheritance, yet, by a subsequent clause, he gives the rents in arrear to the persons to whom he has left the “estates and properties.” That clause must be read as parcel of the devise of the lands, and as shewing the intention of the testator that George should take an estate in fee. *Randall v. Tuchin*(a) decided, that the word “estate,” used in the operative clause of a will, although referring to locality, conveys a fee-simple, unless there is in the will other matter to control that signification. There *Gibbs*, C. J., in delivering judgment, says (b): “It is admitted by the counsel for the plaintiff, that the word ‘estate’ carries a fee, unless other parts of the will restrain its effect. Formerly a narrower construction prevailed; and it was held, that, if the former words described locality, the word ‘estate’ was not descriptive of the quantity of interest, but designated local position; but it is now held; that though the word ‘estate’ points at a certain house or parish where the estate is situate, yet it shall carry a fee, unless restrained by other parts of the will. It may be that the signification of the word ‘estate’ may

(a) 6 Taunt. 410.

(b) Page 416.

be restrained, but it lies on the party who seeks to narrow its construction to shew by what expressions in the will it is restrained." This case might have been different, if the first devise had been strictly one for life; but, being indefinite, the subsequent clause makes it the same as if the testator had said, "I give my 'estates and properties' to my sons and daughters," which would clearly pass the fee. [*Pollock*, C. B.—The testator only meant by the latter clause to designate the persons whom he intended to receive the unpaid rents.] In *Wilkinson v. Chapman* (a), the testator, after giving his wife an annuity for her life, "to be issuing out of all his real estate, lands, and hereditaments in P.," devised "the said estate, lands, and hereditaments" to his daughter and her heirs; but, in case his daughter died under twenty-one, and without issue, he devised "the said estate, lands, and hereditaments" to his wife for her life, and, after her decease, to the children of A. share and share alike; and it was held, that, subject to the previous interests given to the daughter and to the wife, the children of A. living at the testator's death took an estate in fee. Lord *Gifford*, M. R., in delivering judgment says, "Whatever might have been the opinion of the Court had the case been new, the authorities have clearly established that the word 'estate'—unaccompanied by any other expression indicating that, in using it, a testator meant to denote the locality of the property, and not quantum of interest—will pass the fee; and even where the words have been 'all my estate in or at A.,' the fee has been held to pass. On the other hand, where it appears by the context that the testator, in using the word 'estate,' meant not to convey the quantum of interest, but to point out a description of the property, there the word 'estate' will not ex vi termini pass the fee." Though the testator, in bequeathing the unpaid rents, has used the word "estate" with reference to

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the devise to his wife, which is for life only, that is no reason for restricting the words of the other devise, which is capable of carrying the fee. In *Stewart v. Garnett*(a), the devise was of "one moiety of the rents, issues, and profits of my estate named Islington, to be divided equally amongst my grandchildren; the other moiety of the rents, issues, and profits of my said estate I give to my son and his heirs;" and it was held that the grandchildren took the fee as tenants in common in a moiety of the estate. In the case of *Goodwyn v. Goodwyn*(b), Lord *Hardwicke* expressed some doubts whether under a devise of "all my estates" the fee passed; but in *Jarman on Wills*(c), it is said to "have been long established, that a devise of a testator's *estate* includes not only the corpus of the property, but the whole of his interest therein; and the same effect has been given to the word 'estates' in the plural number, notwithstanding the doubts expressed by Lord *Hardwicke*." In *Roe v. Bacon*(d) the devise was to the testator's wife of "all and singular my freehold lands, messuages, and tenements at Tutbury, &c., or elsewhere, together with all my household goods, cattle, chattels, &c. for life; and after her decease, then all *the said estate, goods, &c.* to be divided among my sons, &c., share and share alike;" and it was held that the sons took a fee in the lands after the death of the wife. Lord *Ellenborough* there says, "If we were called on to construe this will with the same critical precision that would be prescribed to a grammarian, I should be much inclined to adopt the argument of the learned counsel, because *the said estates* do seem, in strictness, to refer to the freehold lands, messuages, and tenements before devised, according to the rule, *verba relata inesse videntur*. But in cases of this sort, unless the testator uses expressions of absolute restriction, it may in general be taken that he intends to dispose

(a) 3 Sim. 398.

(b) 1 Ves. sen. 227.

(c) Vol. 2, p. 181.

(d) 4 M. & Sel. 366.

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of the whole interest; and in furtherance of this intention, courts of justice have laid hold of the word *estate* as passing a fee, wherever it is not so connected with a mere local description, as to be cut down to a more restrained signification. Now in this case we find the word *estates*, which at this day may be taken to be equivalent to *estate* for the purpose of passing the whole interest; and really an argument is afforded from the company in which this word is found, why it should so mean. For the testator devises *all the said estates, goods, &c.* amongst his sons, which, without doubt, passed the entire property in the goods to them; wherefore, by the aid of collocation, the word *estates* may, I think, fairly be intended to comprehend the entire interest in the lands." Instead of using the word "estate" in every devise, the testator here concludes by saying that the devisees shall have the unpaid rents of the estates and properties which he has respectively given to each. [*Parke, B.*—By that clause the testator does not purport to give any estate, but it is only descriptive of what he had given before.] When the testator says, "I have given my estate and properties to certain persons," there is a clear declaration of intention. In the devise to John, the testator uses the word "estate." The authorities are collected in Jarman on Wills (*a*), from which it is evident that the word "estate" will pass the fee, unless it distinctly appears to be qualified by something previous.

The second point is, whether the children of the testator's wife who had no issue at his death, took any interest under this will. The testator gives the residue of his property to be equally divided between his wife and "her children *who have issue.*" It does no violence to the language to construe that as a gift to the wife and such children as *shall have issue.* [*Parke, B.*—If the devise had been to "children,"

(*a*) Vol. 2, p. 181.

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those only would have taken who were living at the time of the testator's death.]

Phipson was not called upon to argue.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—(After stating the special verdict.) There are two questions raised by this special verdict.

The first, whether the devise to George White carried a fee in the devised lands.

The second, whether, under the residuary devise, the children of Nanny White, who had no issue at the death of the devisor, took any interest.

We are all satisfied upon both of these points, and decide them in favour of the lessor of the plaintiff.

The first question depends upon the construction of the words "estates and properties," in the part of the will in which they are used.

The devise to George White of half an acre of freehold land, an acre of copyhold land, a leasow of arable land, &c., unquestionably passed an estate for life only to George White; but the learned counsel for the defendant contends that the operation of this devise is extended by the subsequent words, "I give and bequeath and order the rents or interest that is behind, due and unpaid, shall go and be paid to that person *I have left* the estates and properties respectively to."

It is contended that this clause is explanatory of the testator's meaning, and shews that he intended all his interest in the devised land to pass.

It is established by a long course of decisions, that the word "estate" or "estates," used in the operative part of the will, passes not only the corpus of the property, but all

the interest of the testator in it, unless controlled by the context; and that superadded words of local description, more applicable to the corpus of the property, indicating its situation or the nature of its occupation, do not prevent it from passing the whole interest. Nor do words apparently explanatory of the meaning of the term inserted in the devise itself, as where the testator leaves his real estate, *that is*, his land and buildings situate at A.: *Denne v. Wood* (a); or his freehold estate, *consisting of* thirty acres of land: *Gardner v. Harding* (b); or where the testator, after devising dwelling-houses to one for life (with a minute description), all *which estates* he devised after his death to another: *Randell v. Tuchin* (c). The Courts have extended the meaning of the word in order to effectuate what it may always be presumed that it was the intention of the testator to have done.

But where the word “estates” is not used in the operative clause of the devise itself, but is introduced into another part of the will referring to it, we find no decision or dictum authorising us to construe it as having the effect of extending the meaning of the operative clause, whether prior or subsequent, and to read the will as if the testator had said “by the devise of lands in another clause I mean to give all my estate in these lands.”

This is the distinction pointed out by *Gibbs*, C. J., in the case just referred to of *Randell v. Tuchin*, where he says that the word “estate” is here used in the *operative* part of the devise, not introduced incidentally after the devising part is perfected, but introduced in the devise itself; and *Heath*, J., states the rule to be, that where the word “estate” is an *operative* word, it passes the fee.

And it has been long settled, that where the word is used in a prior part of the will, as where the testator says, “as

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(a) 7 Taunt. 35. (b) 2 Moore, 565. (c) 6 Taunt. 410.

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to all my estate, I devise the same as follows," and then proceeds to devise lands, the use of the word "estate" will not enlarge the subsequent devises. It cannot be construed, in that case, as meaning a declaration by the testator that, by the subsequent devise of land, he meant to devise a fee; nor can it in this be held to amount to a statement by the testator that, by the prior devise, he intended that all his interest should pass.

For these reasons, we are of opinion that a fee in the several lands devised did not pass to George White. As the devise itself did not carry a fee, the subsequent words merely referring to it, and not being intended themselves to give any interest in the lands, do not. They are merely descriptive of persons to whom something else is given in a prior part of the will.

On the second question we have already given our opinion. The words "who *have* issue" must mean, who *have* when the will takes effect, that is, at the time of the testator's death; as a devise to her *and her children* would include only the children living at that time, the superadded description of having issue must be construed as applicable to those children who then have issue. Upon the latter point no stress was laid by the able counsel for the defendant.

Judgment for the plaintiff.

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ASSUMPSIT.—The first count of the declaration stated, that the defendant, before and at the time of the making of the promise &c., was owner of, and interested in, and in possession of a certain ship called the “Lord Cochrane,” then being at a certain port, to wit, Pernambuco, in South America, and bound from thence to a certain port, to wit, Liverpool, in England, of which said ship one L. Smith then was the master duly appointed by the defendant; and thereupon the plaintiff, to wit, on &c., at the special instance and request of the defendant, caused to be shipped and loaded in and on board of the said ship, at Pernambuco, divers goods and merchandise of him the plaintiff, of great value, to wit, of the value of 5000*L.*, to be carried and conveyed in the said ship by the defendant for the plaintiff, from Pernambuco to Liverpool, and there, to wit, at Liverpool, to be delivered by the defendant to the plaintiff, the dangers and accidents of the seas and navigation only excepted, for certain freight and reward then agreed to be paid by the plaintiff to the defendant in that behalf; and thereupon afterwards, to wit, on &c., the said ship set sail and proceeded on her said voyage from Pernambuco to Liverpool, with the said goods and merchandise of the plaintiff and certain other cargo on board thereof, and afterwards, and whilst she was so proceeding on her said voyage with the said goods and merchandises and cargo on board thereof as aforesaid, to wit, on &c., the said ship struck upon a certain reef and upon a certain bank in the high seas, by which the said ship became and was greatly injured and damaged; and thereupon, and in consequence of the said injury and damage so sustained, it became and was proper and necessary, and it was then deemed to be proper and necessary by the said L. Smith, he then being

The master of a ship damaged by perils of the seas, hypothecated at a foreign port, by one bottomry bond, for necessary repairs, the ship, freight, and cargo, amongst which were the plaintiff's goods. The ship and freight realized less than the sum borrowed, and the plaintiff was obliged to contribute towards the difference, and also to pay his proportion of the costs of a suit instituted in the Court of Admiralty by the obligee of the bond:—*Held*, that the plaintiff might maintain an action against the owner of the ship on an implied promise to indemnify; also, that a plea stating that the bond was executed by the master without express authority from the defendant, and that when the same was executed, the cost of repairs exceeded the value of the ship and freight, and as soon as the defendant had notice he abandoned the ship

and freight, and never did ratify the act of the master, was bad on general demurrer.

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the master of the said ship and the agent of the defendant in that behalf, to put back and sail back again to Pernambuco, to have the said injury and damage repaired; and the said ship, with the said goods and merchandises of the plaintiff and the said other cargo so on board thereof, did thereupon then put back and sail back again to Pernambuco; and the said injury and damage was then and there repaired by and under the direction and authority of the said master; and the costs and expenses then necessarily incurred at Pernambuco in and about the repairing the said damage and injury, and in and about providing the necessary stores and victuals for the supply of the said ship and the crew thereof, and in and about making and disbursing the other payments and disbursements then properly and necessarily made and disbursed by the said master, on behalf of the defendant, at Pernambuco, in order to have the said repairs effected, and to enable the said ship to complete the said voyage in which she was then engaged, that is to say, from Pernambuco to Liverpool, amounted in the whole to a large sum, to wit, the sum of 7132*l.* 3*s.* 8*d.* And the plaintiff in fact saith, that Pernambuco was and is a foreign country, that is to say, in South America; and neither the defendant nor any other person interested in the said ship was then there, but, on the contrary thereof, were natives of and then resident in England; and the said master of the said ship, that is to say, the said L. Smith, had not, nor was he provided by the defendant, nor any other person, with money or funds to enable him to pay and defray the costs and expenses aforesaid, or to complete the said voyage in which the said ship was then engaged, that is to say, from Pernambuco to Liverpool; and thereupon, being then unable to raise or borrow money by any other means, in order to obtain the said sum necessarily required by him in that behalf to pay and defray the said costs and expenses so necessarily incurred as aforesaid, the said L. Smith, then being master of the said ship, and

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acting as such, and within the scope of his authority, did then and there, at Pernambuco, to wit, on &c., lawfully execute a certain bottomry bond under his hand and seal, in three parts, all of which said parts were duly signed and sealed by him the said L. Smith, as such master, and were dated of the same day, and were to the same tenor and effect; and each of the said writings was to the effect following, that is to say, that he the said L. Smith, master of the barque or vessel called the "Lord Cochrane," of London, of the burthen of 449 $\frac{3}{4}$ tons, or thereabouts, then at anchor in the outer roads of that harbour of Pernambuco, and bound for Liverpool (meaning the said ship), for himself and in the names of T. Benson (meaning the defendant) and W. Benson, both of the city of London, merchants and ship-owners, their heirs, executors &c., owners of the said barque, were held and firmly bound unto Messrs. M'Calmont & Co. of that city of Pernambuco, merchants, in the penal sum of £10,000 of the lawful money of Great Britain, for the payment of which, well and truly to be made unto the said M'Calmont & Co., their heirs, executors, &c., he, the said master, thereby bound himself, as well as the aforesaid owners, their heirs, executors, and administrators, firmly by those presents; and it was in and by the said bottomry bond further expressed and declared, that whereas the above-bounden L. Smith, for himself and owners, had taken up and received of and from the said M'Calmont & Co. the full and just sum of 7132*l.* 3*s.* 8*d.*, being the needful repairs to, and expenses on, the said barque and her cargo, the said barque having been compelled to re-enter the said port of Pernambuco, in consequence of striking upon the bank and reef off that harbour, when attempting to proceed on her voyage to Liverpool, upon Saturday the 29th day of June then last past, and which said sum of 7132*l.* 3*s.* 8*d.* was to run on the block freight and cargo of the said barque "Lord Cochrane," whereof the said L. Smith was master, and to proceed from thence to the port of

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Liverpool at the rate or premium of £20 per cent., in consideration whereof, the usual risks of the seas excepted, and for the further security of the said M'Calmont & Co., the said L. Smith, for himself, as well as in the names of the before-mentioned owners, did, by those presents, mortgage and assign over to the said M'Calmont & Co., their heirs, &c., the said barque "Lord Cochrane," her freight and cargo, together with all her tackle, apparel, furniture, and appurtenances; and it was further declared that the said barque "Lord Cochrane," her freight and cargo, were thus assigned over for the security of the money taken up by the said L. Smith for himself and the before-recited owners, and should be delivered to no other use or purpose whatsoever until payment of that bond was first made, with the premium that might become due thereon: and the condition of the said writings obligatory was thereunto and to each of them subscribed to be to the tenor and effect following, that is to say, that if the above-bounden L. Smith, for himself and his said owners, their heirs, executors, &c., should and did well and truly pay or cause to be paid unto the said M'Calmont & Co., or their attornies in England, legally authorised to receive the same, their heirs, executors, &c., the full and just sum of 8558*l.* 12*s.* 4*d.* sterling, being the principal of that bond, together with the premium which should become due thereon at or before the expiration of twenty days after the arrival of the said barque in the port of Liverpool, or, in case of the loss of the said barque, such an average as should have become due on the salvage, then that obligation to be void and of no effect, otherwise to remain in full force and virtue; and that having signed to three bonds (meaning the said bottomry bonds), all of the same tenor and date, the one of which being accomplished, the other two should be void and of no effect; as by the said bottomry bonds, reference being thereunto had, will fully appear. And the plaintiff in fact saith, that the said M'Calmont & Co. then duly advanced, lent, and

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paid to the said L. Smith, as such master as aforesaid, the sum of 7,132*l.* 3*s.* 8*d.*, upon the security aforesaid, and on no other, and which said sum was then duly applied by the said L. Smith in paying and defraying the said costs and expenses so necessarily incurred at Pernambuco as aforesaid; And the plaintiff further saith, that the said bottomry bond was a valid and binding instrument, and operated by law to bind and hypothecate the said cargo on board the said ship, and, amongst it, the said goods and merchandize of him the plaintiff so shipped and loaded on board thereof as aforesaid, of all which said several premises the defendant then, and before the making of the promise hereinafter mentioned, had notice: and thereupon and in consideration of the said several premises, the defendant then promised the plaintiff to indemnify and save him harmless against any loss or damage which might lawfully accrue to him, the plaintiff, as owner of the said goods and merchandises, by or by reason of the said premises. And the plaintiff in fact says, that afterwards, to wit, on &c., the said ship again proceeded on her said voyage, and with her said cargo, and with the said goods and merchandises of the plaintiff, then being part of the said cargo, to wit, on &c., arrived at Liverpool aforesaid. And the plaintiff further saith, that the said L. Smith did not, nor did the defendant, nor the said W. Benson, nor did any or either of them, nor any one for them or in their behalf, at or before the expiration of twenty days after the arrival of the said ship at Liverpool, or at any other time, pay to the said M'Calmont & Co., or to any one on their behalf, the said sum of 8558*l.* 12*s.* 4*d.* in the said bond mentioned, or any part of the said last-mentioned sum. And the plaintiff further says, that by reason of the non-payment of the said sum of 8558*l.* 12*s.* 4*d.*, according to the tenor and effect of the said bond, the said M'Calmont & Co., in due form of law, to wit, on &c., took proceedings and made suit in the Court of Admiralty, against the said ship, her freight, and cargo, to recover payment of

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the said sum of money, and afterwards, to wit, on the day and year aforesaid, duly obtained judgment and execution for the recovery thereof, and the costs of the said suit, amounting together to a large sum, to wit, the sum of 13,991*l.* 5*s.* 3*d.* And the plaintiff further saith, that the value of the said ship, and of her freight, and of her tackle, apparel, furniture, and appurtenances, then amounted in the whole to a less sum than the said sum of 8558*l.* 12*s.* 4*d.* in the said bond mentioned, to wit, to the sum of 3191*l.* 5*s.* 3*d.*, and which sum alone was realised to the said M'Calmont & Co. out of and in respect thereof, whereby and by reason of which said several premises, a large sum, to wit, the sum of £10,000, remained and was due and unpaid to the said M'Calmont & Co., upon and by virtue of the said bond and judgment; whereupon the plaintiff, to wit, on &c., was forced and compelled to pay to the said M'Calmont & Co., and did then pay to the said M'Calmont & Co., as a contribution towards the said last-mentioned sum and the interest thereon lawfully accruing, for all which he and his said goods and merchandise were then liable, a large sum, to wit, the sum of £2000, then being a less sum than the value of his said goods and merchandises, and being over and above the said freight payable in respect thereof. And the plaintiff further saith, that the said payment and contribution which he was so compelled to make as aforesaid, was loss and damage which lawfully accrued to him, the plaintiff, as owner of the said goods and merchandises, for and by reason of the said premises in the introductory part of this declaration mentioned: and he, the plaintiff, also sustained further loss and damage which lawfully accrued to him as owner of the said goods and merchandise, by reason of the said premises last-mentioned, that is to say, loss and damage to the amount of £1000, for costs which he the plaintiff was forced and obliged to pay and become liable to pay, as well to the said M'Calmont & Co., as for his own costs necessarily and justifiably incurred by him, in

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and about the said proceedings in the said Admiralty Court, which were so taken upon the said bond, by reason of the defendant having refused to pay the said sum therein mentioned, of all which said several premises the defendant then had notice. Yet the defendant, not regarding his promise, did not nor would indemnify or save harmless the plaintiff against the said loss or damage which so lawfully accrued as aforesaid to the plaintiff, as owner of the said goods and merchandise, or any part or portion thereof, but wholly neglected and refused so to do. Whereby and in consequence whereof, the plaintiff hath wholly lost and been deprived of the said several sums, which he the plaintiff was so forced and compelled to pay as aforesaid, and by means of the said several premises the plaintiff hath been and is otherwise greatly injured and damnified.

Plea, that the said bottomry bond was executed by the said master without any express authority from the defendant, and that before and at the time when the same was executed by the said master, at the place and under the circumstances in the said first count mentioned, the amount of the costs and expenses in the said count mentioned would exceed, and in fact exceeded, the amount of what would be and was the value of the said ship when repaired, as in the said count mentioned, and of all the freight which would be earned by the said ship, in case she should, after being repaired as in that count mentioned, proceed upon her said voyage, and should safely arrive at Liverpool with all her cargo. And the defendant further saith, that when and so soon as he received notice of the premises, he did abandon the said ship, and all right and title to the same, and to all freight in respect of the said voyage, and did refuse to ratify, and never did ratify, the act of the said master in executing the said bottomry bond as in the said count mentioned.

Verification.

General demurrer, and joinder.

The case was argued in Trinity Term, 1845, by *Martin*,

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for the plaintiff, and Sir *T. Wilde* for the defendant; and again, by desire of the Court, in Easter Term, 1847 (April 30 and May 5), by *Martin* for the plaintiff, and Sir *Fitzroy Kelly* for the defendant.

Arguments for the plaintiff.—The declaration is good. The liability of the defendant arises from clear legal principles. The contract, which is made with the owner of the ship by his accredited agent, is to bring home the plaintiff's goods in that particular ship, subject to the ordinary proviso respecting dangers of the seas. The ship sustained an injury; and it being the duty of the owner to repair, the law empowers him for that purpose to hypothecate the goods of the merchant. Some expressions of Lord *Stowell*, in his celebrated judgment in the case of *The Gratitude* (*a*), will be referred to, as shewing that the master is the agent of the owner of the goods; but that is not so. In cases of unavoidable necessity, the master may sell the goods of the merchant; the latter, however, is entitled to be indemnified by the shipowner. The case is similar in principle to that of *Exall v. Partridge* (*b*), where the goods of a stranger on the premises of another were distrained by a landlord for rent in arrear, and it was held that the stranger might maintain an action for money paid to the use of the lessees, for, under the circumstances, the law implied a promise to repay. In *Powell v. Gudgeon* (*c*), which was an action upon a policy of insurance on goods, it appeared that the ship, being disabled by perils of the seas, was obliged to put into port for repairs; and in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of those expenses, and the Court held that the underwriter was not answerable for this loss. *Bayley, J.*, there says,—“It does not appear to me that this was a loss by a peril of the sea, or such as entitles the assured to reco-

(*a*) 3 Rob. 255.

(*b*) 8 T. R. 308.

(*c*) 5 M. & Sel. 431.

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ver under the general words of the policy, but a loss for which the owners of the goods will be entitled to be reimbursed by the owner of the ship. The owner of the ship undertakes to have the ship fit to perform her voyage; and in case of accident, it is the duty of the owner, and the master in place of the owner, to provide for its repair." [Pollock, C. B., referred to *Sarguy v. Hobson* (a)]. The question then is, had the master a right to hypothecate the cargo? It was so decided in *The Gratitude* (b). The judgment in that case is founded on the fact that there is no difference in this respect between hypothecation and sale. In Abbott on Shipping (c), it is said,—“If the master, being compelled to take refuge in a foreign port during the course of his voyage, has occasion for money for the repairs of the ship, or other expenses necessary to enable him to prosecute and complete the voyage, and cannot otherwise obtain it, he may, as hath been before observed, either hypothecate the whole cargo or sell a part of it for this purpose: in the latter case, if the ship reach the place of destination, the merchant will be entitled to receive the clear value for which the goods might have been sold at that place.” For that position the case of *Alers v. Tobin* (d) is cited. *Richardson v. Nourse* (e) is to the same effect. The language of Lord Stowell, in his judgment in *The Gratitude*, is not opposed to this view. Speaking of hypothecation, jettison, and ransom, he says (f),—“In all these cases the character of agent respecting the cargo is thrown upon the master, by the policy of the law acting on the necessity of the circumstances in which he is placed. But it is said that this can only be done for the immediate benefit of the cargo, and not for the repairs of the ship. It is very true that this involuntary agent ought, like an appointed agent, in all

(a) 2 B. & C. 7.

(b) 3 Rob. 240.

(c) Chap. 5, p. 371, 8th ed.

(d) At Guildhall, Oct. 30, 1802,

before Lord Ellenborough, C. J.

(e) 3 B. & Ald. 237.

(f) 3 Rob. 260.

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cases to act for the best respecting the property. Even in the case of an universal *jactus*, which appears least likely to conduce to the benefit of the cargo,—still it is so; the ship is compelled in that case to pay an average, by which means the little which is to be taken as a remnant of the cargo is preserved; whereas, otherwise, both ship and cargo would have been totally lost. In the case of ransom, what was intended for the benefit of the cargo *may* eventually consume the whole, the proprietor will not be benefited in such a case, but he cannot be damnified; he will have had the chance of advantage without the danger or possibility of loss, for he cannot suffer beyond the value of the cargo, which, without such ransom, would have gone to the enemy in toto. It is the same consideration which founds the rule of law that applies to the hypothecation of a ship.” That language is correct with reference to the case then before the Court, but is inapplicable to the present case. When the master of a ship exercises his right of jettison, can it be said that he acts as the agent of the owner of the goods? In the case of *Cary v. White* (a), which is cited in Abbott on Shipping (b), the House of Lords held that the shipowner is liable for money borrowed by the master for the necessary repairs and use of the ship during the voyage, though not upon bottomry. *Webster v. Seekamp* (c) is to the same effect. In *Arthur v. Barton* (d), it was held that the master of a ship has authority by law to pledge the credit of his owner for money advanced to the master in an English port where the owner has no agent, if such advance of money was necessary for the prosecution of the voyage.

Secondly,—The plea is bad. The first allegation is, that the bond was executed by the master without the express authority of the defendant. That is immaterial; for, assuming the master to be the agent of the shipowner, it is

(a) 5 Bro. P. C. 325.

(b) P. 136, 8th ed.

(c) 4 B. & Ald. 352.

(d) 6 M. & W. 138.

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his duty to repair the ship. The plea goes on to allege that, at the time the bond was executed, the costs and expenses exceeded in amount what would be the value of the ship when repaired, and its freight. It is not, however, shewn that the master acted otherwise than *bonâ fide*. [*Parke, B.*—In *Vlierboom v. Chapman (a)*, we held that the master was agent of the shipper, so as to give a good title to a purchaser of the damaged cargo, but for no other purpose.] The third allegation is, that the defendant, when he received notice, abandoned the ship and freight. The answer to that is, that the Court of Admiralty has decided that the bond is good. The judgment of the Court of Exchequer Chamber in the case of *Benson v. Chapman (b)* entirely disposes of this plea. There the Court say,—“The vessel was repaired, and we cannot assume that the master, in repairing her, was, as suggested, no longer the agent of the owner, but in the situation of a mere stranger, or wrongdoer, taking the vessel without authority, and dealing with it as his own, especially as no motive can be suggested for his so doing. It must be borne in mind that it is the primary duty of the master to use all his efforts to bring the adventure to a successful termination, and as the repairs were done with that view, it is to be assumed that they were done in the due discharge of the master's duty; at any rate, we cannot come to a contrary conclusion without an express finding to that effect.”

Arguments for the defendant.—This is an action arising out of a bottomry bond, and if such an action could be maintained, the books would be replete with cases. For more than a century before the determination of *The Gratitude*, which was in the year 1801, it had become the frequent practice of merchants to hypothecate the cargo as

(a) 13 M. & W. 230.

(b) In error from C. B., not yet reported.

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well as the ship by one bottomry bond, but no trace of an action like the present can be found. The argument might have no weight if used with reference to joint-stock companies, because they are novel institutions; this case, however, must have frequently occurred. It is immaterial for this question whether an insurance has been effected or not. The declaration states that the money could not be procured without hypothecation of the cargo as well as of the ship and freight. The latter are seized, and both being exhausted, a claim is made upon the cargo. This action is not maintainable, on the ground that the money was borrowed by the master, not as agent for the shipowner, nor for any purpose in which he was interested, or for the performance of any duty which he was bound to perform, but as the agent, and for the sole benefit, of the owner of the cargo. It is not disputed that if a master borrows money to be laid out in the repair of a ship, and for the benefit of the owner of the ship, he acts as the agent of the shipowner. But the doctrine has no application to money procured on a bottomry bond. A shipowner is not liable to any action for money borrowed on a bottomry bond. Where the master hypothecates the ship, he acts as agent of the shipowner, but if he goes beyond that, and also hypothecates the cargo, he borrows for the owner of the cargo. The authority of the master to borrow money on bottomry bond is limited to the value of the ship. The law is clear as to the power and duty of the master. If the sum borrowed be less than the value of the ship, the master acts within the scope of his authority, but if the sum required for repairs should exceed the amount of the value of the ship when repaired, and the master in consequence hypothecates the cargo, he then acts as the agent of the shipper. Where the master hypothecates the ship, he cannot render the owner liable beyond its value. The owner of the cargo cannot call on the shipowner to pay for that which is of no advantage to him, for he must have

given up the ship when the cargo was hypothecated. The case of *The Gratitude* (a) came on upon petition, which stated—"That the imperial ship, *The Gratitude*, having on board a cargo of fruit, and bound from Trieste, Zante, and Cephalonia, to London, met with extremely tempestuous weather, and sprung a leak, whereby the cargo sustained considerable damage; that the master was obliged, for the safety of the ship and cargo, and for the preservation of the lives of the crew, to put into Lisbon and unlade; that the master applied for advice and assistance to F. Calvert, who was the correspondent of Mr. Powell, one of the principal consignees in England; that Mr. Calvert wrote a letter to Mr. Powell, advising him of the misfortune which had befallen the cargo, and the steps which had been taken, and desiring his directions for their future conduct; that in answer to that application, he received a letter from Mr. Powell, stating—"that to the master it belonged exclusively to adopt every necessary measure for the preservation of the cargo, and that if it was necessary to unlade, the master alone was to judge of the propriety of such a measure:" that the master being in want of money to defray the charges of the repairing the vessel, and of unlading the cargo, borrowed of the aforesaid F. Calvert the sum of 5273*l*. 12*s*. on a certain bottomry bond bearing date the 31st of January, 1801, binding the ship and appurtenances, cargo, and freight to pay the said sum of 5273*l*. 12*s*. within twenty-four hours after the arrival of the said ship in the port of London, or any other port; that the said bond had been duly presented to the master, who refused to discharge it; that the holder had no other means of recovering his debt than by proceedings against the ship, freight, and cargo, and prayed the Court to decree a monition against the bail given to answer the action in respect to the cargo and freight, for payment of the balance due after payment of the proceeds of the sale of the ship." It was there argued that the master had not,

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(a) 3 Rob. 240, 255.

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under the circumstances stated, a right to hypothecate the cargo for the repairs of the ship, for payment whereof the ship, her master, owners, and freight, were liable. Lord *Stowell*, in delivering judgment, says (a):—"The proposition contained in the act does not go the length of asserting universally that the master has not a right to hypothecate his cargo in any possible case, but denies the power of the master to hypothecate it under the circumstances of this particular case. In the course of the discussion, however, the argument has been carried to the entire extent, and it has been contended that the master has no right to bind the owner of the cargo in any case, upon this ground, that although he is the agent and representative of the ship, and by virtue of that relation may bind the ship and its owners, he is not the agent of the proprietors of the cargo, and therefore cannot bind it. It is said that he is the mere depository and common carrier as to the cargo, and that the whole of his relation to the goods is limited to the duties and authorities of safe custody and conveyance. This position, that *in no case* has he a right to bind the owners of the cargo, is, I think, not tenable to the extent in which it has been thrown out; for though, in the ordinary state of things, he is a stranger to the cargo beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and super-cargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted, that, in some cases, he must exercise the discretion of an authorised agent over the cargo, as well in the prosecution of the voyage at sea as in intermediate ports, into which he may be compelled to enter." This is not money borrowed which creates a *debt*. It is not averred on the record that the master, believing

(a) 3 Rob. 257.

that the ship would ultimately be worth the costs of repairs, determined to repair for the benefit of the shipowner, and in no respect as the agent of the owner of the cargo. So far as regards the pledge of the ship, the master acts as the agent of the shipowner; but with respect to the pledge of the cargo, he is agent of the owner of the cargo. [Platt, B.—Suppose the costs of repair £4000, and the value of the ship and freight £5000, and of the cargo £4000, and that, after the arrival of the vessel at its place of destination, the owner of the cargo pays £4000 to redeem it, could he call upon the shipowner to repay him?] He would acquire the same right as the obligee, and might sue the shipowner in the Court of Admiralty. It is manifest from the judgment of Lord Stowell in *The Gratitude*, that he entertained an opinion that the master had no power to bind the shipowner beyond the value of the ship. He says (a)—“It is said that he ought to have bound his owners likewise; but those who propose that should first prove his authority to bind his owners personally beyond the value of their ship (which value he has already bound), and likewise find merchants at Lisbon who would be willing to advance money upon the personal security of the owners living at Trieste, whom they might be under the necessity of ultimately following into a personal suit in the Supreme Court of the Empire.” If, however, the master has a power to bind the shipowner beyond the value of the ship, he can only do so by a personal contract, not by a bottomry bond. He cannot bind the owner and also the ship. The master would be guilty of a breach of duty if he were to hypothecate the cargo for the exclusive benefit of the shipowner, and where the amount of repairs is less than the value of the ship, it must be presumed that the master would pledge the ship alone. On whom is the loss to fall—on the bondholder or on the owner of the cargo? If the money borrowed be

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(a) 3 Rob. 274.

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within the value of the ship and freight, the owner of the cargo sustains no injury, although his cargo is pledged, for the shipowner is liable to and must pay the full value of the ship and freight. If the money borrowed exceeds the value of the ship and freight, the owner of the cargo ought to pay the surplus, for it has been borrowed and applied for his exclusive benefit. [*Parke, B.*—The fallacy of your argument is, that the liability of the owner is restricted to the value of the ship. Suppose the ship worth £2000, the cargo worth £7000, and the costs of repair to be £8000,—who is to sustain the loss? Or suppose the master hypothecates without a bottomry bond, or sells, a *part* of the cargo,—would not the shipowner be liable?] If the master hypothecates or sells the whole or part of the cargo before or after the bottomry, the shipowner would be liable, but not if the bottomry is part of the same transaction. In that case he cannot charge the owner of the ship beyond its value, for there is no personal contract—it is a mere pledge. [*Pollock, C. B.*—Your argument would go to the extent that the owner might get a new ship at the expense of the cargo.]

Secondly.—The plea is good. Though the bond is valid, the master had no power to bind the owner of the ship beyond its value. Lord *Stowell*, in the same judgment, says (a):—"In all cases it is the prospect of benefit to the proprietor that is the foundation of the authority of the master. It is therefore true, that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs." In like manner, if the repairs produce a benefit to the cargo beyond the value of the ship, so that the owner of the ship derives no benefit from the pledge, the owner of the cargo ought to sustain the whole liability. His Lordship proceeds (b)—"But hypothecation may be of the whole, be-

(a) 3 Rob. 261.

(b) P. 263.

cause it may be for the benefit of the whole, that the whole should be conveyed to its proper market; the presumption being that this hypothecation of the whole, if it affects the cargo at all, will finally operate to the sale of a part; and this in the best market at the place of its destination, and in the hands of its proper consignees. * * On the other hand, the safe conveyance of a valuable cargo may be, in many instances, of infinitely more value to the merchant than the whole expense of the repairs if the whole *could* be devolved on the cargo. Generally it cannot be so, in the very form and structure of these bonds the ship and freight being usually the first things that are hypothecated; but if it were to happen that they were omitted in the literal terms of the bonds, still they would be liable in contribution to the extent of their value, although the cargo alone had been made immediately answerable to the foreign lender, who has nothing to do with averages of any kind." It is hardly possible that the learned judge could have used such language, if he had supposed that the owner of the cargo had a remedy over against the shipowner. He evidently considered that natural justice and equity required that some share of the liability should be imposed upon the owner of the cargo, even where the ship was not pledged.

Arguments in reply.—Unless the responsibility of ship-owners is limited at common law, as in certain cases under the statute 53 Geo. 3, c. 159, the plaintiff is entitled to recover. Suppose a contract with a shipowner to bring home 200,000 bales of cotton from America, and the goods are placed on board a ship which is unfit to convey them,—has the shipowner a right to repair at the expense of the owner of the cargo? As the plaintiff's goods have been made the means of raising money, to enable the shipowner to perform his contract by bringing home the goods, the plaintiff is entitled to indemnity. The passages in the judgment of Lord *Stowell* are perverted from their meaning; they only apply

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to the question then before the Court; if not, they are extrajudicial.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This case, which is one of considerable importance, was argued for the second time in Easter Term last, before my Brothers *Parke*, *Rolfe*, and *Platt*, and myself, having been previously heard when my Brother *Alderson* was present. The question arises on a demurrer to a plea to the first count of a declaration in assumpsit, brought by the shipper of goods from Pernambuco to London, against the shipowner, to recover a compensation for the loss he had sustained, the master having, in consequence of damage to the ship by perils of the seas in a foreign port, properly hypothecated, for its necessary repairs, the ship, and also the freight and cargo, including the plaintiff's goods, by one bottomry bond; and the goods having become liable, on the deficiency of the ship and freight, to pay the difference, and the plaintiff having been compelled to pay it. The facts are stated at length on the record, and made the consideration for a promise by the defendant to indemnify, and the question on the declaration is, whether these facts raise an implied, or are a good consideration for an express, promise to do so.

There is a plea which states that the bottomry bond was executed by the master without the defendant's express authority, and when the costs and expenses exceeded in amount what would be the value of the ship when repaired, and its freight, and that the defendant, when he received notice, abandoned the ship and freight, and did not ratify the act of the master. But there is no doubt that, notwithstanding those circumstances, the bond was valid, for it is clear that a merchant advancing money on bottomry in a foreign port, though bound to shew a reasonable case of

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unprovided necessity for the advance, from the want of repair or otherwise, is not bound to inquire into the expediency of incurring the expense of those repairs with reference to the interest of the owner: *The Vibilia* (a). And on the argument Sir F. Kelly admitted the validity of the bond.

The question then is, whether, under the circumstances stated in the declaration, the defendant is responsible to the plaintiff for the sum he had been obliged to pay; and we are all clearly of opinion that he is.

It is the primary duty of the master, acting for the owner, to do his best to convey the cargo to its place of destination in the same ship, and in case of damage to repair it. "He ought to look out for the means of accomplishing his own and his employer's contract; that is, the safe conveyance of the property entrusted to his care, and in the same vehicle which he had contracted to furnish:" *The Gratitude* (b).

The owner of the goods is under no obligation to contribute to any expenses, except such as constitute a general average, and that of the repairs in this particular case does not fall under that description.

To accomplish the object of repairing the vessel, the master is authorised to bind his owner, by causing the repairs to be done on his credit, in which case the tradesman may sue the owner; or by borrowing money on his credit where that is necessary, in which case the lender has his remedy against the owner; or by selling a portion of the cargo, which is in effect borrowing from the shipper through the medium of a sale, *Richardson v. Nourse* (c), and in this case the shipper may sue the shipowner; or the master may hypothecate part or the whole of the cargo, which gives a right to the proprietor of it to recover a compensation from the owner of the vessel. All these are merely modes of raising money by the agent of the shipowner on his account, and for his use, to enable him to do his duty by repairing

(a) Wm. Rob. 10.

(b) 3 Rob. 261.

(c) 3 B. & Ald. 237.

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the vessel, and in all the shipowner must repay the lender. The agency to borrow by these various modes, and so to bind his employer to the lender, is cast upon the master by the necessity of the case.

That the shipowner was bound in all these cases to repay the money borrowed, was not disputed by Sir *F. Kelly*; but he argued that the bottomry of the ship by the master made all the difference, and had the effect of limiting the responsibility of the owner to the value of the ship and freight, and that to be enforced by a remedy against the ship only. He could not contend that if there was a sale or hypothecation *before* or *after* the bottomry, the owner would not be liable for the amount borrowed by means thereof, and he was therefore obliged to limit the freedom from further responsibility to the single case where the hypothecation of the ship and cargo were effected by one instrument. For this position there is no principle, nor, when properly considered, any authority. The bottomry bond gives no remedy to the lender against the owner of the ship, nor against the owner of the cargo, personally; the remedy is in rem in both cases, but as between the freighter and shipowner, the cargo of the former is pledged to secure the debt of the latter, and when the former has been compelled to pay the debt through the medium of the pledge, he must be reimbursed. What difference can it make on principle, whether this liability of the ship by bottomry is by a separate instrument, or the same as that which attaches liability to the cargo?

The supposed authority for this proposition, and which was mainly relied upon by Sir *F. Kelly*, was some part of the judgment of Lord *Stowell* in the case of *The Gratitude*. The language there made use of by that eminent judge, if taken literally, appears to sanction the notion that the master is acting merely as the agent of the shipper in hypothecating the cargo; that the hypothecation is for his benefit, and that he must bear the loss. But the judgment

must be understood *secundum subjectam materiam*. The question in that case was, whether the act of the master in hypothecating the cargo was done by the implied authority of the shipper, *so as to give the pledgee a good title*. This was the question in the cause; not whether that act of the master would give a remedy to the shipper against the owner of the vessel—a question entirely beside the case. The opinion there expressed, that the master had an authority, arising from the necessity of the case, to bind the shipper, means only that he was bound as to the pledgee or purchaser of the goods, whose title could not be impugned, and the pledgee was the plaintiff in that suit.

The authority which necessity gives the master to borrow for his benefit would not be effectual—no borrowing could take place through the medium of sale or hypothecation of part, or the hypothecation of all the cargo, unless a good title could be thereby given to the purchaser or pledgee. There is an agency, therefore, created by the same necessity, and given by the shipper to the master, to bind him by the sale or pledge. But this agency for the freighter is confined to cases of necessity affecting his interest, and where the sale or pledge is directly or indirectly for his benefit. It is directly beneficial where goods are damaged by perils of the sea and sold; it is indirectly so where there is damage to the ship, and repairs of the ship become necessary for the benefit of the whole adventure.

In all other cases, where by no possibility the shipper could derive benefit, there is no implied authority from him to the master, and the act of sale or pledge would be simply wrongful. This authority from the shipper to the master to give a good title by a sale or pledge, is explained and limited by Lord *Stowell*, in his celebrated judgment above referred to (*a*), and the observations on which so much stress was laid by Sir *F. Kelly*, are to be understood as made with

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(a) *The Gratitude*, 3 Rob. 277.

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reference to this authority, and, so understood, they do not affect the present question, which is not one between the shipper and creditor.

Another part of Lord *Stowell's* observations, as to contribution on the sale of part (*a*), are applicable to cases of general average only, and must have been made with reference to such a case.

We are all clearly of opinion that the plaintiff in this case is entitled to our judgment.

Judgment for the plaintiff.

(*a*) 3 Rob. 284.

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VACATION SITTINGS AFTER MICHAEL- MAS TERM.

PRICE and Another, Executors of the Will of JOHN PRICE,
deceased, v. WOODHOUSE & WARD.

Dec. 1.

TRESPASS.—The second count of the declaration stated, that the defendants, on &c., broke and entered a certain close and building of the plaintiffs as such executors, to wit, a certain close, being part and parcel of a certain farm there, called Hergest Court farm, in the occupation of the plaintiffs as such executors, and known and called the fold or farm-yard there, and a certain building called and known as the stable there, and continued there for a long space of time, &c., and then seized and took certain goods and chattels of the plaintiffs as such executors, to wit, *two horses*, of great value, to wit, of the value of £100, and then with force and arms unlawfully carried away the same, and kept and detained forcible possession thereof, until the plaintiffs, as such executors, in order to regain possession thereof, were forced and obliged to pay a large sum of money, to wit, £50, &c.

The defendants pleaded, fifthly, as to the breaking and entering the said close and building, and continuing therein, and seizing and taking *parcel of the said goods and chattels*,

and entering the said close and seizing and taking parcel of the said goods and chattels, to wit, the said other horse, a justification of the seizure of that horse as a heriot due in respect of another customary tenement whereof the plaintiffs' testator died seised. The plaintiffs replied separately to each of the pleas, that the defendants, at the same time, place, and occasion, when they took the horse in the introductory part of that plea mentioned, also seized and took the said other horse (being the residue of the said goods and chattels), under colour and pretence of the said heriot custom, and under an assertion and claim of right to seize and take the same other horse as and for the said heriot custom:—*Held*, on special demurrer, that the replications were good, inasmuch as the seizure of the other horse rendered the defendants trespassers ab initio as to the entry, as well as the seizure of the chattels.

Trespass for breaking and entering the plaintiffs' close, and seizing and taking certain goods and chattels, to wit, two horses. The defendants pleaded, as to breaking and entering the said close, and seizing and taking parcel of the said goods and chattels, to wit, one of the said horses, a justification of the seizure of that horse, as a heriot due in respect of a customary tenement whereof the plaintiffs' testator died seised. The defendants also pleaded, as to the breaking

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to wit, *one of the said horses*, and carrying away and keeping and detaining the same, that before and at the time of the death of the said John Price in the declaration mentioned, and before and at the said time when &c., one J. Woodhouse was and still is lord of the manor of English Huntingdon, in the county of Hereford, and that the said John Price, before and at the time of his death, was seised in his demesne as of fee, at the will of the lord, according to the custom of the said manor, of and in a certain customary tenement, then and still being parcel of the said manor, demised and demisable by copy of the Court Rolls of the said manor, according to the custom of the said manor, to wit, of a certain tenement consisting of divers, to wit, three acres of arable land, formerly held with a certain messuage and garden, called and known as the Upper House, which said tenement was and is situate in the parish of Kington in the county aforesaid, and within the manor aforesaid: that within the same manor there now is, and from time whereof the memory of man is not to the contrary continually hath been, an ancient custom there used and approved, that the lord of the said manor, from time whereof the memory of man is not to the contrary, hath seized and taken, and been accustomed to seize and take, and still ought to seize and take, upon and after the death of every tenant dying seised in his demesne as of fee of any customary tenements within the same manor, held of and at the will of the lord, according to the custom of the said manor, demised and demisable as aforesaid, in respect of such tenement whereof such tenant hath died so seised, the best beast which was of the said tenant at the time of his death, as and for and in the name of a heriot custom: that before the said time when &c., the said John Price, so being tenant of the said tenement as aforesaid, died so seised thereof as aforesaid, whereupon afterwards, to wit, at the said time when &c., the defendants, as the servants of said J. Woodhouse, so then being lord of the said manor as

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aforesaid, and by his command, peaceably and quietly broke and entered the said close and building, for the purpose of seizing and taking the said horse in the introductory part of this plea mentioned, being one of the said two horses in the said second count mentioned; the said horse then being upon the said close and in the said building, and a beast which was of the said John Price deceased, at the time of his death, as and for a heriot in respect of such tenement aforesaid, whereof the said John Price died so seised as aforesaid, and then continued thereon for that purpose for a short time, to wit, for such time as was necessary for seizing and taking the same, and no longer; and thereupon then also, to wit, at the said time when &c., as the servants of said J. Woodhouse, and by his like command, seized and took the said horse, being the said horse in the introductory part of this plea mentioned, and one of the said horses in the said second count mentioned, which said horse was of the said John Price, deceased, at the time of his death, and carried away and detained the same, as and for and in the name of an heriot custom, for and in respect of the tenement aforesaid whereof the said John Price died so seised as aforesaid, as for the cause aforesaid they lawfully might, which said trespasses are the breaking and entering of the said close and building, and the seizing, taking, carrying away, and detaining the said part of the said goods and chattels, to wit, one of the said two horses in the said second count mentioned, and the said horse which is in the introductory part of this plea mentioned.—Verification.

Sixthly, "As to breaking and entering the said close and building, and continuing therein, and seizing and taking part of the said goods and chattels, to wit, *one other of the said two horses*, and carrying away and detaining the same," a justification in precisely similar terms, of the seizure of "the said other horse," as a heriot in respect of a certain other customary tenement, consisting of a messuage and dwelling-house at Floodgates Bridge.

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Replication to fifth plea.—That the defendants, on and at the said time, place, and occasion, when and where they seized and took the said horse in the introductory part of the same plea mentioned, also seized and took the said other horse in the said second count and in the same plea mentioned, (being the residue of the said goods and chattels of the plaintiffs as such executors), under colour and pretence of the said heriot custom, and under an assertion and claim of right to seize and take the same other horse as and for and in the name of the said heriot custom, and in abuse of the said custom and right.—Verification.

The replication to the sixth plea was precisely similar in terms to the replication to the fifth.

Special demurrer to the fifth plea, assigning for cause, that the replication neither traversed any material averment in the plea, nor, whilst it admitted the allegations therein contained, shewed any matter of excuse or discharge in avoidance thereof; that the allegations in the replication were wholly irrelevant and immaterial, and the defendants could not safely or properly take any issue thereon.

The special demurrer to the replication to the sixth plea was precisely similar to the above.

Smythies, in support of the demurrer.—The replications are bad, whether the fifth and sixth pleas be construed as one plea or as distinct pleas. If those pleas amount to one matter of defence, namely, that the defendants took two horses, one in respect of tenement A., and the other in respect of tenement B., then the replications are bad, for they neither traverse nor add anything to the facts stated in the pleas. If the fifth and sixth pleas be taken as distinct pleas, the replications afford no answer, for they admit the defendants' title to enter, but fail to shew such an abuse of authority as would render them trespassers ab initio, because it is not alleged that the other horse was seized in respect of the same tenement. But even admitting an abuse of authority,

that will not render the defendants trespassers ab initio. The case falls within the first resolution in the *Sir Carpenters' case* (a), that "when an entry, authority, or license is given to any one by the law, and he abuses it, he shall be a trespasser ab initio; but not where the entry, authority, or license is given by the party." A heriot is a portion of the price which the tenant pays for the land; it is as much a part of the terms of the holding as the payment of a fine or quit rent. There is a distinction between a distress by a landlord for rent, and the seizure of a heriot by a lord of a manor. The contract between landlord and tenant is simply for payment of rent, and the law gives the former an authority to distrain; but on the admission of a tenant to a copyhold tenement, he enters into a contract to allow a heriot to be taken at his death, therefore the right to seize the heriot is a right granted by the party himself. The replications admit the facts which shew that the heriot vested in the lord, and he having once made his election, no subsequent abuse of authority could divest the property from him.

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Keating, contra.—The defendants, by this form of pleading, attempt to evade the trial of the custom. The lord claims a right to take a heriot in respect of each and every tenement of which the tenant dies seised, and the defendants ought to have pleaded that the tenant died seised of two tenements, and therefore they took the two horses. The replications are good, for the facts therein alleged shew that the defendants are trespassers ab initio. The pleas must be considered as offering separate and distinct matters of defence. It appears, then, by the replications, that the defendants, by command of the lord, having a right of entry to take one beast on each occasion, took two, and the lord not having made his election, they became trespassers as to both. A custom to seize a heriot is an authority given by

(a) 8 Rep. 146a.

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law, and an abuse of it renders the party a trespasser ab initio. In the *Six Carpenters' case* (a) it is said, "the law gives authority to enter into a common inn or tavern; so to the lord to distrain; to the owner of the ground to distrain damage feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle, and such like." It is difficult to see how those various instances are less the act of the party than a custom to seize a heriot. In Viner's Abridg., tit. "Trespass," (G. a.) pl. 2, it is said,—“If lessor enters into the house to see if waste be done, and there stays all night, he is a trespasser ab initio.” Again, pl. 13, “If the custom of a vill be, that the bailiffs of the vill shall have twopence for every hide of every sheep, cow, or ox which is killed within the said vill, and for non-payment of it to seize the hides, &c., and after the bailiffs do take certain hides for non-payment, &c. and tan them, and convert them into leather, by this they are trespassers ab initio, for though they do it for necessity, because otherwise the hides would putrefy, yet this will not excuse them, inasmuch as the damage by the putrefying will be only to the owner, and not to them, for they may have an action of debt for the twopence. M. 42, 43, El. B. R., between Duncan and Reeve, adjudged.”—The reason why an abuse of authority or license given by law renders a party a trespasser ab initio, is, that the law adjudges by the subsequent act quo animo he entered. Here the subsequent act was the seizure of two horses without any election as to either. *Abington v. Lipscomb* (b) shews that an election is necessary in order to give the lord a property in the beasts seized. It has, indeed, been held, that where a distress is made upon goods, some of which are not distrainable, the distrainer is a trespasser ab initio as to the latter only: *Harvey v. Pocock* (c), *Dod v. Monger* (d); but if it be con-

(a) 8 Rep. 146 b.
 (b) 1 Q. B. 776.

(c) 11 M. & W. 740.
 (d) 6 Mod. 215.

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tended that the lord had a right to take one horse, and could only be a trespasser as to the other, then the plea should have shewn which he elected to take. Assuming that the right to take a heriot is analogous to a right to distrain, the case of *Harvey v. Pocock* puts a wrongful seizure on the same footing as a subsequent abuse. The tortious act which renders the party a trespasser ab initio, also measures the extent of the trespass. Here the lord, having seized two horses which cannot be distinguished, is a trespasser as to both. But unless the plaintiff adopted the present form of replication, he could not recover damages in respect of both horses. For that purpose, it would be useless to take issue on the custom. [*Parke, B.*—The point is reduced to this,—if a party having a right of entry to take one heriot, enters and takes two, does he thereby become a trespasser ab initio, both as to the entry and also as to the seizure? Suppose a landlord enters for the purpose of distraining, and he takes certain distrainable goods, and also some chattels not the subject of a distress, would that make him a trespasser ab initio as to the entry, or only as to the seizure of the chattels? That question was not considered in *Harvey v. Pocock*.] There does not appear to be any decision expressly in point, but the reasons for the judgment in *The Six Carpenters' case* are conclusive to shew that a subsequent unlawful distress renders the party a trespasser in respect of the entry. In *Ozley v. Watts (a)*, the declaration did not charge a breaking of the close, but only a seizure of the chattel.

Smythies replied.

PARKE, B.—It appears to me that the replications are good. The defendants, by their pleas, attempt to justify the entry and seizure of one horse as a heriot in respect of

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one tenement, and the other horse as a heriot in respect of another tenement. Then the construction of each replication is this:—though true it is you entered to take a horse as a heriot due for the particular tenement, yet at the same moment you took another horse not due for that tenement. To make the entry good, it must be good with reference to the seizure. That which is *prima facie* an election, is shewn to be no valid election in point of law, and the seizure of the other chattel renders the defendants trespassers *ab initio* as to the entry, as well as the seizure of the chattels. The defendant may amend his pleas on the usual terms, by stating that Price died seised of two tenements, and that there was a custom to take a heriot in respect of each, and that the horses were seized as heriots for those tenements.

ALDERSON, B., and ROLFE, B., concurred.

Amendment accordingly.

Dec. 6.

DORRINGTON v. CARTER.

To an action of trover for goods, the defendant pleaded, that the goods in question were deposited with the defendant as a security for a certain debt due to the defendant from the plaintiff, on the terms that the defendant should retain

them till the debt should be paid; that the debt had not been paid; and therefore, that the defendant had refused to deliver them up, as he lawfully might: Verification:—*Held*, on special demurrer, that the plea was bad, as amounting to an argumentative denial of the plaintiff's right of possession at the time of the alleged conversion.

TROVER for certain goods and chattels.—Plea: That heretofore and before the said time when &c., and whilst he the plaintiff was possessed of the said goods and chattels in the declaration mentioned, to wit, on the day and year in the declaration mentioned, a large sum of money, to wit, the sum of 10*l.* 3*s.*, was due and owing from the plaintiff to the defendant for certain board and lodging theretofore supplied by the defendant to the plaintiff, and at his request, and for the carriage and conveyance of certain tim-

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ber and goods theretofore carried and conveyed in divers carts and carriages by the defendant for the plaintiff, and at his request, and for certain goods and chattels theretofore sold and delivered by the defendant to the plaintiff, and at his request; and in consideration thereof, the plaintiff, being so possessed of the said goods and chattels in the declaration mentioned as aforesaid, then deposited the same with the defendant as a security for the payment by the plaintiff to the defendant for the said money so due and owing as aforesaid, and upon the terms and agreement, amongst others, that the defendant should hold and detain the same until that money had been paid by the plaintiff to the defendant. And the defendant further says, that the said debt has not been paid by the plaintiff to the defendant, nor hath the plaintiff tendered to the defendant, or offered to pay him the said amount of the said debt, but the said debt is still due, and unpaid and unsatisfied; wherefore the defendant hath continually held and detained, and still holds and detains, the said goods and chattels, for the cause in this plea aforesaid, and at the said time when &c. did refuse to deliver up the same to the plaintiff on being then required by him so to do, as the defendant lawfully might, being the said conversion in the declaration mentioned. Verification.

Special demurrer, assigning for causes, that the plea is an argumentative denial that the plaintiff was lawfully possessed of the said goods as of his own property, and that it ought to have concluded to the country, and not with a verification, and that it does not confess any conversion, and amounts to the general issue.

Joinder in demurrer.

J. Brown, in support of the demurrer.—The plea is bad, as amounting to an argumentative denial of the plaintiff's right of possession at the time of the conversion. It is also bad as amounting to the general issue, as it does not

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contain any admission of an actual conversion. The plea is in substance this,—that the goods were deposited with the defendant, to be retained by him until payment of a certain debt due from the plaintiff to him, and that the debt had not been paid when the defendant refused to deliver them up, as he was justified in doing; in other words, it is a plea of lien. “Now the action of trover only lies where the plaintiff has the right to possession as well as the legal property in the suit. That was established by the case of *Gordon v. Harper* (a),” as *Tindal*, C. J., said in the case of *Owen v. Knight* (b). The latter of these cases is very like the present. It was an action of trover, and the Court of Common Pleas held that the defendant was entitled to give in evidence facts of a similar nature to the present, under a plea that the plaintiff was not possessed as of his own property of the goods in the declaration mentioned. This case was recognised by the Court of Queen’s Bench in that of *White v. Teal* (c), where Lord *Denman* says, “He (the defendant) ought to have traversed that the plaintiff was possessed as of his own property, in manner and form as alleged in the declaration, and then he would have put in issue the plaintiff’s right of possession, as was holden in *Owen v. Knight*, and would have been entitled to prove the lien in order to negative that issue.” These authorities were recognised by this Court in *Mason v. Farnell* (d). *Alderson*, B., there says, in delivering the judgment of the Court, “No doubt plausible reasons may be assigned for saying that the proper plea on which such a defence as a lien or the like may be made is the plea of not guilty, by which the conversion is denied.” *Isaac v. Belcher* (e) decided that the plea of not possessed puts in issue the right of the plaintiff’s possession at the time of the

(a) 7 T. R. 9.

(b) 4 Bing. N. C. 54; 5 Scott,
307.

(c) 12 Ad. & Ell. 114.

(d) 12 M. & W. 674.

(e) 5 M. & W. 139.

conversion. In the second place, *Acraman v. Cooper* (a) is expressly in point, that this plea does not sufficiently confess a conversion. A refusal to give up the goods on the ground of a lien does not amount to a conversion. A demand and refusal are only evidence of it; and it is improper to plead mere matter of evidence.—He was then stopped by the Court.

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Ring, contra, contended that the matter set up in the plea, being a license to retain the goods upon the terms of a special agreement, might be specially pleaded, as it gave the plaintiff the advantage of knowing what the precise defence was which the defendant intended to rely upon at the trial.

PER CURIAM (b).—We are all of opinion that the plea is bad, as amounting to an argumentative denial of the plaintiff's right of possession of the goods in question at the time of the conversion. The plea sets up a lien. That is inconsistent with the plaintiff's lawful possession, as was held in the case of *Owen v. Knight*, in the Court of Common Pleas, with which decision we entirely concur. The argument, therefore, being well founded upon that point which is raised by the special demurrer, that it is an argumentative denial of the plaintiff's lawful possession at the time of the conversion, it is not necessary to give any opinion upon the other point. There must therefore be judgment for the plaintiff.

Judgment for the plaintiff.

(a) 10 M. & W. 585.

(b) *Parke, B., Alderson, B., Rolfe, B., and Platt, B.*

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Dec. 6.

CRAIG v. LEVY.

A party may appear by attorney to reverse an outlawry for error in fact.

The rule in this respect is the same in the Exchequer as it is in the other courts.

IN this case proceedings in outlawry had been taken against the plaintiff, and he had been pronounced an outlaw. Upon these proceedings he brought a writ of error, assigning error in fact. He appeared by attorney. To this assignment of error the defendant in error demurred, and assigned the following causes of demurrer:—"That the said assignment is bad in this, that it is pleaded by attorney and not by the said R. R. Craig in person; and also for that the said assignment, being of error in fact, ought to be pleaded in person and not by attorney; and being pleaded in the Court of Exchequer of Pleas, there is no statute by which the said defect is remedied."

Joinder in demurrer.

S. Temple, in support of the demurrer.—The plaintiff in error should have appeared in person, and not by attorney. He might indeed have appeared by attorney for error *in law*. It was said by *Manwood*, J., in *Taylor's case*, that where matter in fact is pleaded in avoiding of an outlawry, it ought to be pleaded in person; but a matter of record might be by attorney (*a*). This case was relied upon in the subsequent case of *Chorley v. Haslewood* (*b*). In *Cumpling's case* (*c*), which occurred in the Court of King's Bench, it was said that a different practice existed in the Common Pleas. [*Alderson*, B.—In an anonymous case in *Croke's Reports* (*d*), a person who had been outlawed prayed to appear by attorney, and, upon an affidavit of his sickness, the Court, *ex gratiâ speciali*, allowed him to appear by attorney; but the clerk was commanded to enter it *quod venit in propriâ personâ*, as the law was clear that upon an

(a) 4 Leon. 22.

(b) 1 Carthew, 7.

(c) 2 Roll. 490.

(d) Cro. Jac. 462.

outlawry he ought to appear in person. *Parke, B.*—What was the practice in the Court of Common Pleas at the time of the passing of stat. 4 & 5 W. & M. c. 18? That act merely gave the power of appearing by attorney to reverse the outlawry in the King's Bench, but it did not apply to the Court of Common Pleas. [*Walford.*—In *Lee v. Millard* (a), which was in the Common Pleas, *Powell, J.*, said that it was not necessary to appear by attorney in that court, although it was so in the King's Bench. He also referred to *Houlditch v. Swinfen* (b).] Those cases were merely upon motion. [*Parke, B.*—It seems to have been the understanding at the time the stat. 4 & 5 W. & M. was passed, that the practice in the Common Pleas was that a person who was outlawed might appear by attorney to reverse the outlawry; that statute, therefore, appears to have been passed for the purpose of making the practice of the Courts of King's Bench and Common Pleas uniform; if such had not been the understanding, there would have been a provision to include the Court of Common Pleas.]

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Walford, contra, was not called upon.

PER CURIAM (c).—We are all of opinion that there must be judgment for the plaintiff in error, as we think that he is entitled to appear by attorney to reverse an outlawry for error in fact. It seems to be clear, that, before the Uniformity of Process Act, such was the practice in the Courts of King's Bench and Common Pleas; and by that act we have the power to entertain this matter. The cases in *Salkeld* and *Leonard* seem to be at variance; but there

(a) 2 Salk. 495.

(c) *Parke, B., Alderson, B.,*

(b) 2 Bing. N. C. 712; 3 Scott, *Rolfe, B., and Platt, B.*

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is no doubt that the same privilege existed in the Common Pleas as that which was given to the Court of King's Bench by the statute 4 & 5 W. & M.

Judgment for the plaintiff in error.

Dec. 6.

BATES v. TOWNLEY and Another.

A declaration stated that certain matters in dispute were referred to J. H. and J. M., "and to such third person as should be chosen and agreed upon by the said J. H. and J. M., and appointed by writing under their hands to be indorsed on the agreement of submission before proceeding on the said reference, to arbitrate, &c. jointly with them of and concerning the matters in difference, so as the said arbitrators, or any two of them, should make their award on or before a

ASSUMPSIT.—The declaration stated, that, before and at the time of making the agreement thereafter mentioned, certain differences and disputes had arisen and were depending between the plaintiff and defendants, touching or concerning or arising out of certain dealings and transactions in railway shares between them, and thereupon heretofore, to wit, on &c., by a certain agreement in writing then made by and between the plaintiff and defendants for finally settling such differences, it was, amongst other things, agreed by and between the plaintiff and defendants mutually and reciprocally, that the said matters in dispute should be, and the same were thereby referred to the award, arbitrament, final end and determination of John Head, of Liverpool, sharebroker, a person chosen by or on behalf of the said plaintiff, and James Mill, a person chosen by or on behalf of the said defendants, and of such third person as should be chosen and agreed upon by the said John Head and James Mill, and appointed by writing under their hands, to be indorsed on the agree-

certain day, and that the costs of the reference and award, including a reasonable compensation to the said arbitrators for their trouble, should be in the discretion of the said arbitrators." The declaration then averred that J. H. and J. M., before proceeding with the reference, chose and agreed upon, and by writing under their hands nominated and appointed J. M. to be third arbitrator together with them; that the three said arbitrators made their award, and found a certain sum to be due from the defendant to the plaintiff, and further that the plaintiff and defendant should pay a moiety each of the costs of the reference and award, including the compensation to the arbitrators. Breach, non-payment of the sum so found to be due:—*Held* bad, on general demurrer, for not shewing that a third arbitrator was properly appointed.

ment now in recital, before proceeding on the said reference, to arbitrate, adjudge, and determine jointly with them of and concerning the said matters in difference, so as the said arbitrators or any two of them should make their award in writing under their hands, ready to be delivered to the said parties in difference, or such of them as should require the same, or the executors or administrators of the same parties, or either of them, on or before the first day of April then next ensuing, or on or before such subsequent day or days as the said arbitrators or any two of them should at any time, or from time to time, by writing under their hands, appoint for making and publishing their award in the premises; and it was thereby agreed that the costs of the said reference and award, including a reasonable compensation to the said arbitrators for their trouble, should be in the discretion of the said arbitrators. Averment of mutual promises, and that the said J. Head and J. Mill, before they proceeded on the said reference, to wit, on the 10th of February, 1847, chose and agreed upon, and by writing under their hands nominated and appointed, John Miller, of Liverpool, merchant, to be third arbitrator, together with them the said J. Head and J. Mill, in and concerning the said matters in difference so referred, and that the said J. Head, J. Mill, and J. Miller, afterwards and before the time so appointed for making the said award, to wit, on the day and year last aforesaid, took upon themselves the burthen of the said arbitration, and afterwards and before the time so appointed for making the said award, to wit, on the 18th of February, 1847, the said J. Head, J. Mill, and J. Miller, having taken upon themselves the burthen of the said arbitration, did make and publish their award in writing under their hands of and concerning the said matters in difference so referred to them as aforesaid, ready to be delivered to the said parties, and did thereby award, find, and determine that there was

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due from the defendants to the plaintiff in respect of the matters in difference referred to them the said arbitrators as aforesaid, the sum of 2039*l.* 10*s.* 3*d.*, which sum they did thereby award and direct that the said defendants should pay to the said plaintiff, at the office of Mr. Robert Norris, solicitor, North John Street, Liverpool, on Monday, the 1st day of March then next, at twelve o'clock at noon, in full satisfaction and discharge of the said matters in difference. And they did further award that the costs of the said reference, and of that their award, including the compensation to them the said arbitrators for their trouble, should be paid and borne as follows; that is to say, one moiety thereof should be paid and borne by the plaintiff, and the other moiety thereof by the defendants. Breach, non-payment of the said sum of 2039*l.* 10*s.* 3*d.*

Plea.—That it was in and by the said agreement agreed that the costs of the said reference and award, including a reasonable compensation to the arbitrators for their trouble, should be in the discretion of the said arbitrators, and thereby the said costs, including the said reasonable compensation to the said arbitrators, were mutually submitted by the plaintiff and the defendants to the said arbitrators, and formed and were part of the matters referred by the said agreement; that the said award is correctly set forth in the said declaration mentioned, and that the said arbitrators did further award, as in the said declaration mentioned, that the costs of the said reference and of their said award, including the compensation to them the said arbitrators for their trouble, should be paid and borne as follows; that is to say, one moiety should be borne and paid by the plaintiff, and the other moiety thereof by the defendants: that the said arbitrators did not, nor did any two of them, by the said award in any way, except as in and by the said declaration appears, ascertain or specifically mention or shew the amount of the said costs of the said award, including the

said compensation, or the costs of the said award, or the costs of the said compensation, or the amount of the said moiety to be borne and paid by the defendants; and that the said submission was not at any time before the commencement of this suit made a rule of court; nor was the same made in an action or suit, or about any matter or matters forming the subject of an action or suit; nor was the same made by or under any order of a judge, or rule or order of a court.—Verification.

Replication.—That it was not agreed in or by the said agreement that the said arbitrators or any two of them should by their award ascertain, or specifically mention or shew the amount of the said costs of the said award, including the said compensation, or the costs of the said award, or the costs of the said compensation, or the amount of the said moiety to be borne and paid by the defendants: concluding to the country.

Special demurrer, and joinder.—The defendants' points were, that the declaration and the replication are each in substance bad. That the declaration does not shew any award binding on the defendants, as the submission was to two arbitrators, and to such third or co-arbitrator as they should appoint in a particular manner, which is not shewn to have been observed, namely, by writing under their hands indorsed on the submission before proceeding on the reference. That the award and the declaration are bad; as it appears that the award directed payment in moieties of the costs of reference and of the award, including compensation to the arbitrators, but did not ascertain the costs of reference or of the award, including the amount of compensation, or any of those costs; and it is not shewn that the submission was made in a cause, or that it was or could be made a rule of court, or that any circumstances existed to give jurisdiction to any taxing or other officers over such costs or compensation. That the award and declaration

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are bad, as the former directs payment of the sum awarded at the office of a third person, a stranger to the submission, on which office the defendants could not enter without committing a trespass, and subjecting themselves to action. That the replication is bad for the following reasons:—that it contains no answer to the plea; that it takes issue in terms not used in the plea, or corresponding with the language thereof; that it is ambiguous whether it means to deny an assumed legal effect of the agreement stated in the declaration, or to allege as matter of fact that there was no clause in the said agreement expressly providing for ascertainment of costs by the arbitrators;—if the meaning be the latter, the replication should not have concluded to the country,—if the former be the meaning, the replication is an informal and insufficient demurrer; that as the statement in the plea of the agreement is merely a re-statement of the declaration, the replication, in denying the agreement relied on by the defendants, of necessity denies a material part of the declaration, and contains a departure therefrom; that the replication offers to put in issue matter which is not contained in the plea,—or if it be contained therein, is matter of law, (being the construction of a written agreement,) which the plaintiffs should not have offered to submit to a jury, but should have referred to the judgment of the Court; that it puts a wrong construction on the plea, as it assumes the defence to be simply that it was agreed that costs and compensation should be ascertained by the arbitrators; whereas the defence really raised is this, that the costs of award, including compensation to the arbitrators, being submitted by the agreement of reference, and the arbitrators having elected to receive, and having directed payment of such costs and compensation, it became their duty to go further, and to fix the amount thereof, or give the parties a rule by which to ascertain the amount of the moiety payable by each.

J. Henderson, in support of the demurrer.—It is clear that the replication is bad, for the reasons assigned by the demurrer. The plaintiff cannot traverse an allegation in the plea which is also contained in the declaration. The allegation is not of any new matter.

The plea is good. This differs from the case where there is an action pending. [*Parke*, B.—It is to be presumed, in such a case, that the parties stipulate that the costs are to be taxed in the usual way.] Here the arbitrators were to fix the amount of their fees, which has not been done by their award. It is therefore bad. The Court has no power over these costs: *Dossett v. Gingell* (a). The plea is good on general demurrer, though it might have been bad on special demurrer.

Lastly, the declaration is bad. There is no sufficient statement of the appointment of a third arbitrator. It is not stated that the appointment of Miller was indorsed on the agreement of submission. That is a fatal objection, being matter of substance. This point was brought fully before a court of error, in *Everard v. Paterson* (b); and it was there held that the submission being, “so that the award be in writing under the hand of the arbitrator,” it must be shewn in pleading that the award is under hand as well as in writing. This fault in the declaration is not cured by the defendants’ pleading over. The plea does not supply the omission. *Maule*, J., in *Harris v. Goodwyn* (c), said: “I do not find any case in which it has been held that you can supply an omission for the purpose of making a plea a good plea. I take the rule to be, not that you are to supply by intendment matter which is omitted, but that you are to understand that which is alleged in a sense which will support the plea.”

(a) 2 Man. & Gr. 870; 3 Scott, N. R. 179.

(b) 6 Taunt. 625.

(c) 2 Man. & Gr. 405; 2 Scott, N. R. 470.

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Cowling to support the declaration.—It may be that Miller was not properly appointed, but he may be neglected, as the parties might refer the matters to the other two arbitrators. The submission is, that “the said arbitrators, or *any two* of them, should make their award.” [*Parke*, B.—That means two out of the three. *Rolfe*, B.—The parties have a right to the judgment of all three consulting together. *Alderson*, B.—They referred to the two persons named, and to a third to be appointed. It seems to me to be too clear to be argued. *Parke*, B.—There is also a further objection with respect to the costs. You should make it out that the award has been made.] The costs were to be in the discretion of the arbitrators; they need not, therefore, make any mention of them. Then the defect is cured by pleading over. [*Parke*, B.—The declaration is clearly bad, for not shewing that a third arbitrator was duly appointed. The plea does not state that he was.]

PER CURLAM (a).—There must be judgment for the defendants, for a defective declaration.

Judgment for the defendants.

(a) *Parke*, B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

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COVENANT on an indenture, dated the 16th of March, 1846, entered into by the plaintiff of the one part, and the defendants, therein described as provisional directors of a projected Railway Company, called "The Direct Northern Railway Company," of the other part (profert), after reciting that the plaintiff was the owner in fee of certain lands in the county of Lincoln, and that the Direct Northern Railway Company had given notice of their intention to apply for an act, and that a bill for that purpose had been introduced into the House, for making a railway from London to York, with branches, which was proposed to be carried through a part of the plaintiff's property, and that the plaintiff had intimated his intention to oppose the bill; that a projected Company, called "The Great Northern Railway Company," had also signified their intention to apply for an act, and had introduced a bill into the House for making a railway from London to York, and that the plaintiff as a landowner had agreed with the defendants not to oppose the application of The *Direct* Northern, and

To a declaration on an indenture made between the plaintiff and defendants, provisional directors of a projected railway company, called the *Direct* Northern, after reciting that plaintiff was owner of certain lands through which that railway, and another called the *Great* Northern, were intended to pass, and that the plaintiff would support the former and oppose the latter line, it was covenanted that, if the *Direct* Northern's bill should pass, before six months from the date of the

deed, the Company should pay the plaintiff certain large sums of money in certain specified cases for the injury done to, and for the purchase of his land; that, if the *Great* Northern's bill should pass within eighteen months from the same date, that the *Direct* Northern was to pay the plaintiff, within three months after that event, certain sums of money in certain specified cases for compensation, &c., *provided*, that, if no act authorizing the *Direct* Northern to make their line should be passed within six months from the date of the indenture, either party might put an end to the agreement by giving notice in writing, and that, after the giving of such notice, the agreement and everything contained in it should be absolutely null and void, except the proviso and a covenant as to certain costs to be paid to the plaintiff; and, *lastly*, that if the Companies should be amalgamated, that then, three months after such event, the amalgamated Companies should pay certain sums of money in certain events, one of these being the sum of £6000 if the line followed the course of the *Direct* line, without a branch to Stamford, and that in such case all the covenants applicable were to be performed by the amalgamated Companies. The declaration, after alleging that the Companies were amalgamated, that the line took the course of the *Direct* Northern, without a branch to Stamford, and that the period of three months had elapsed, concluded with laying as a breach the non-payment of the £6000. The defendants pleaded, that no act of Parliament authorizing the *Direct* Northern to make their intended line was passed within six calendar months, and that the defendants gave the plaintiff notice that they were desirous to put an end to the agreement, and that no part of the line had passed through plaintiff's estate, or that it had been injured under the act:—*Held*, on general demurrer, that the plea was a good answer to the action.

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to oppose to his utmost the *Great Northern*, in consideration whereof, and of the terms thereafter contained, the plaintiff and defendants, so far as the covenants thereafter contained, did thereby, for themselves, their heirs, &c., covenant and agree with each other, that, in case the bill to empower the projected *Direct Northern* to construct the said line should pass into a law at any time before the expiration of six calendar months, to be computed from the date of the said indenture, and the said Company should be thereby authorised to make their said railway, the *Direct Northern* should pay to the plaintiff, his executors, &c., the sum of £25,000 in compensation for the permanent injury occasioned to his property by the said railway, and for the purchase of a certain portion of land delineated in a certain plan, which was to be paid for in the following manner, namely, the sum of £20,000 within three months after the passing of the said bill, and £5000 within three years after the same event, the payment of the last-mentioned sum being subject to certain provisos not material to the present question; that the *Direct Northern*, in the event of their bill being passed, should execute certain works, such as bridges, viaducts, walls, &c. &c., for the accommodation of the plaintiff. [Here followed various other stipulations as to the purchase of additional land &c.; and the plaintiff also covenanted not to oppose the bill of the *Direct Northern*, but to assent to it as a landowner, and to oppose the bill of the *Great Northern*.] That in case, nevertheless, the *Great Northern Railway Company's Bill* should pass into a law at any time before the expiration of eighteen calendar months, to be computed from the date of the indenture, that then the *Direct Northern Railway Company* should, within three calendar months next after the passing of the bill, pay to the plaintiff, his executors, &c., either £15,000 or £5000, in particular events therein specified, as compensation for permanent injury occasioned

by the said railway, and for the land which would be required; that the *Direct Northern* should pay the plaintiff £300 an acre for additional land taken by the *Great Northern*; and the plaintiff covenanted to use his best endeavours to obtain from the *Great Northern* the largest sum which could be reasonably obtained by way of compensation, and for the purchase of land absolutely required, and to pay over the amount to the *Direct Northern*, and that all the plaintiff's costs with respect to both the above bills should be repaid to him: "Provided always, and it was thereby expressly agreed and declared, that, if no act of Parliament authorising the said *Direct Northern Railway Company* to make the said intended railway from London to York should be passed within six calendar months from the day of the date of the said indenture, it should be lawful for the plaintiff, his heirs, &c., at any time thereafter to determine and put an end to the agreement thereby made, and to make the same null and void, by giving, or causing to be given, any notice in writing signed by the plaintiff, his heirs or assigns, or his or their steward or agent for the time being, signifying his or their desire to put an end to the agreement thereby made, to the directors of the said *Direct Northern Railway Company*, or any of them, or any of their agents, servants, or officers, on leaving any such notice for the said Company, or for any of their agents, servants, or officers, at any depôt, counting-house, or office of the said Company, or inserting the same in the 'London Gazette;' and that, from and after such giving, leaving, or inserting of such notice, that agreement, and every article, matter, and thing therein contained (except this proviso and the covenant thereinbefore contained for or in relation to the payment of the costs), should be absolutely null and void, to all intents and purposes whatsoever, as fully as if these presents had never been executed; provided always, and it was thereby

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further agreed and declared, that if no act of Parliament authorising the said *Direct Northern Railway Company* to make the said intended railway from London to York should be passed within six calendar months from the day of the date of the said indenture, it should be lawful for the said directors, parties thereto, of the said projected *Direct Northern Railway Company*, or the survivors or survivor of them, or the executors or administrators of such survivor, at any time thereafter to determine and put an end to the agreement thereby made, and to make the same null and void, by giving, or causing to be given, any notice in writing, signed by the said directors, or the survivors or survivor of them, his executors or administrators, or under the common seal of the said Company, signifying their desire to put an end to their agreement with the plaintiff, his heirs or assigns, or leaving any such notice for the plaintiff, his heirs or assigns, at the mansion-house aforesaid, called &c., and that from and after such giving or leaving such notice, that agreement, and every article, matter, and thing therein contained, except this and the last preceding proviso, and the covenant last thereinbefore contained for or in relation to the payment of costs, should be absolutely null and void to all intents and purposes whatsoever, as fully as if these presents had never been executed." And lastly, that in case there should be an amalgamation of the two companies, then the amalgamated companies should, within three calendar months after the same should have been established by an act of the legislature, and without reference to any alteration or deviation made or to be made of the line of railway, pay unto the plaintiff, his heirs or assigns, the sum and sums of money following, for the permanent injury to the plaintiff's estate, and for purchase of land, namely, if the line of the amalgamated Railway Companies followed in its passage through the estate of the plaintiff the intended line

of the said *Direct Northern Railway Company*, the sum of £25,000 as aforesaid, subject to the deduction of £5000, according to the foregoing terms; but if the said line of the amalgamated companies should in such passage through the plaintiff's estate follow the intended line of the said *Great Northern Railway Company*, with a branch to Stamford, £19,000; or if the said line of the amalgamated companies should, in its passage through the said estate, follow the said intended line of the said *Great Northern Railway Company*, but without such branch, then the sum of £6000; and in such case all the covenants as to purchase of additional land, its re-sale, not deviating without consent, the construction of works, &c. &c., and other covenants, so far as applicable, were to be observed and performed by the amalgamated companies.¹ The declaration then averred, that, after the making of the said agreement the companies were amalgamated, and that the amalgamation was established by act of Parliament, and that the railway was in its passage to follow the line of the *Great Northern Railway Company*, but without the branch to Stamford. The declaration concluded by alleging that the plaintiff had observed and was ready to perform his part of the covenant, and that although three calendar months after the amalgamation had taken place had elapsed before the commencement of the suit, yet the defendant had not paid the £6000.

Plea (amongst others), that no act of Parliament authorizing the said *Direct Northern Railway Company* to make the said intended railway from London to York was passed within six calendar months from the day of the date of the said articles of agreement, and that the defendants did thereupon, on the 23rd day of November, 1846, and long before the commencement of this suit, under and in pursuance of the said proviso in the said articles of agreement in that behalf contained, cause to be left for the plaintiff, at the said mansion-house in the said articles of agreement mentioned, called &c., a notice in writing, signed by the

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defendants, signifying their desire to the plaintiffs to put an end to the same, except as in the said proviso mentioned, to wit, except as to the said covenant in the said articles of agreement contained, for and in relation to the payment of costs. And the defendants further say, that at the time of the leaving of such notice as aforesaid for the plaintiff, no part of the line of railway of the said amalgamated companies had been made upon any part of the said estate or lands of the plaintiff in the said articles of agreement mentioned, nor had any part of such estate or lands then been taken or used by the said amalgamated companies for the purposes of the said undertaking authorised by the said act of the legislature, or any of them; nor had any permanent or other injury been done or committed to the said mansion-house, estate, or lands of the plaintiff, or any part thereof, by the said amalgamated companies, under the powers of the said act or otherwise.—Verification.

General demurrer, and joinder therein.

Peacock, in support of the demurrer.—The plea affords no answer to the action, the amalgamation of the two companies having taken place. The case is shortly this:—There were two companies projected with the view of making a railway from London to York, namely, the *Direct Northern* and the *Great Northern*; and the defendants, on behalf of the former company, stipulated with the plaintiff upon certain terms, that in case the one company or the other should get an act passed for the construction of their railway within certain specified times, they should pay him certain sums of money, provided that if the *Direct Northern* should not obtain their act within six calendar months from the time of the date of the agreement, either party to it should be at liberty to put an end to the agreement; but this is followed by a stipulation that, in case the companies should be amalgamated, then the de-

fendants should, three months after such event, pay £6000 to the plaintiff if it followed the line of the Great Northern, without a branch to Stamford, and certain other sums if they took another course. Now it is submitted that it is clear that the parties never intended to put an end to this covenant in the event of an amalgamation. The Direct Northern Company is in fact established, although it is amalgamated with the other Company. [*Rolfe*, B.—There is no stipulation as to the time when the amalgamation of the Companies is to take place. Suppose the six months to have elapsed without any act having been obtained, and that ten years hence the Companies should be amalgamated, would this agreement still be binding upon these parties? Is it a stipulation, that, at any time, if the Companies be amalgamated, certain things are to be done, or that, if a certain act is not passed within six months, either party may put an end to it by notice? It seems to me that the latter construction is the more correct one, and that it is reasonable to suppose that they did not intend to remain in a state of suspense for an indefinite period. *Alderson*, B.—The position of the proviso creates the difficulty. If it had succeeded the stipulation which refers to the amalgamation, the case would have been different. Now the proviso says that the whole agreement shall be at an end, which cannot be if this part of the agreement is to remain in force; and moreover, there are specific exceptions which have no relation to this stipulation in the proviso.] The main object of this agreement was, that the plaintiff should obtain a certain sum for his lands if the railway from London to York should take one course, and another sum if it should take a different course. Lastly, the notice was not given until after cause of action had accrued. The deed may have been determined by the notice, but the cause of action still remains good. [*Platt*, B.—Surely the notice might have been given any time before action brought.]

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Hartshorn v. Watson (a), on this point, is in the plaintiff's favour.

Sir *F. Kelly*, *contra*, was not called upon.

PER CURIAM (b).—The case is clear, and there must be

Judgment for the defendants (c).

(a) 4 Bing. N. C. 178; 5 Scott, 506. of the argument.

(b) *Alderson*, B., *Rolfe*, B., and *Platt*, B. *Parke*, B., had left the Court at the commencement of the argument. (c) This judgment has been reversed on error in the Exchequer Chamber.

Dec. 2.

AUSTIN v. KOLLE.

Detinue of a bill of exchange drawn by the plaintiff.

Plea, that after the plaintiff drew the bill he indorsed and delivered the same to P., who from thence until the indorsement to defendant appeared to be the owner thereof, and entitled to negotiate the same: that P. afterwards indorsed and delivered the bill to the defendant for good and valuable consideration: that the defendant took the bill from P. without notice that he was not the true owner thereof; whereupon the defendant hath continually detained the same:—*Held* bad, as an argumentative denial of the plaintiff's property in the bill.

DETINUE.—The declaration stated, that the plaintiff delivered to the defendant a certain bill of exchange in writing, to wit, a bill of exchange drawn by the plaintiff upon and accepted by John Hutt, for £18, and bearing date on a certain day, to wit, the 16th June, A. D. 1845, of the plaintiff, of great value &c., to be re-delivered by the defendant to the plaintiff when the defendant should be thereunto afterwards requested. Breach, that the defendant, although often requested, hath not delivered the bill to the plaintiff, but unjustly detains the same.

Plea, that after the plaintiff had drawn the said bill, the plaintiff indorsed and delivered the same to one John Purkis, who afterwards and before the commencement of this suit was possessed thereof, and then and from thence until and at the indorsement and delivering thereof to the defendant, as hereinafter mentioned, held the said bill of

the bill from P. without notice that he was not the true owner thereof; whereupon the defendant hath continually detained the same:—*Held* bad, as an argumentative denial of the plaintiff's property in the bill.

exchange, and appeared to be the owner thereof, and entitled to negotiate, indorse, and transfer the same: that the said John Purkis afterwards, according to the custom of merchants, indorsed and delivered the said bill of exchange to the defendant and one Charles Kolle for a good and valuable consideration, to wit, for and on account of money then due from the said John Purkis to the defendant and the said Charles Kolle: that the defendant then took and received the said bill of exchange of and from the said John Purkis as the true owner thereof, and without any notice that the said John Purkis was not the true owner thereof, and entitled to negotiate and transfer the same: wherefore the defendant from thence hitherto continually held and detained the same bill of exchange, which is the same detainer in the declaration mentioned.—Verification.

Special demurrer, on the grounds that the plea was an argumentative denial of the plaintiff's property in the bill, and that, although it concluded with a verification, it did not confess the material facts stated in the declaration, or give the plaintiff any colour to maintain the action.—Joinder in demurrer.

Rew, in support of the demurrer.—The plea is bad for the causes assigned. It is positively alleged that the plaintiff indorsed and delivered the bill to Purkis, who indorsed and delivered it to the defendant and Charles Kolle. The plea, therefore, shews a good title in the defendant, and an absence of all colour for the plaintiff to maintain the action. Before the new rules, such a plea would have amounted to non detinet, now it is an argumentative denial of the plaintiff's property in the bill.

Bramwell, contra.—The plea does not deny the plaintiff's property in the bill, but sets up a right in the defendant to detain it. It is consistent with every allegation in the plea, that the bill belonged to the plaintiff, and that Purkis, hav-

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ing it in his possession as agent of the plaintiff, delivered it over to the defendant and Kolle. [*Parke, B.*—The word “indorsed” must have its ordinary interpretation, that is, that the bill was effectually indorsed so as to transfer the whole property in it.] The plea states that Purkis appeared to be the owner of the bill, and entitled to negotiate it, and that the defendant took the bill without notice that Purkis was not the true owner. Colour is given, inasmuch as the property in the bill did not pass until Purkis indorsed it, so that there is an admission of the plaintiff’s title up to the very instant of the detention.

PARKE, B.—There must be judgment for the plaintiff. Reading the word “indorsed” in its ordinary sense, it evidently means that all property in the bill passed; consequently, the plea is bad as an argumentative denial of the plaintiff’s property in the bill. Probably the plea would have been good, if it had stated that the plaintiff indorsed the bill to Purkis without value, and to hold as the agent of the plaintiff; there would then have been a colour of title in the plaintiff: but it is unnecessary to decide that point.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

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SEDMAN v. JAMES WALKER, Esq., and APPLETON
STEPHENSON.

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THE declaration stated, that the plaintiff, before and at the time of the committing of the grievance by the defendants hereinafter mentioned, was engaged, retained, and employed by the contractors of certain proposed buildings, works, and erections, to cart and convey away the earth, stones, soil and clay excavated and dug out of the excavations and sites of the said proposed buildings, works, and erections, and used in the preparing and making of bricks, with the horses and carts of the plaintiff, to wit, two horses and one cart, at great gains and profits to him the plaintiff: that, before the committing of the grievances, a certain action had been depending in the Court of our Lady the Queen, before the Queen herself at Westminster, in the county of Middlesex, wherein Appleton Stephenson, one of the defendants in this suit, was plaintiff, and R. Tiplady was defendant, in which said action the defendant therein allowed judgment to go by default for want of a plea, and a writ of fieri facias thereupon was issued against the goods of the defendant in the said action, directed to James Walker, the other of the defendants in this suit, he the said J. Walker then being the high sheriff of the county of York, to be put in execution by him the said J. Walker, as such sheriff as aforesaid: yet the said last-mentioned defendant, as such sheriff, well knowing the premises, and contriving and wrongfully and injuriously intending to harass, oppress, and injure the sheriff; yet the last-mentioned defendant, as such sheriff, contriving to injure the plaintiff by and with the aid, counsel and assistance of S., the other defendant, by him wrongfully and maliciously given, seized, took, and carried away, in execution of the said writ, divers goods and chattels of the plaintiff, to wit, two horses and one cart, under pretence that the same belonged to T., and afterwards sold the goods and chattels as an execution under the writ against the goods of T. By means of the premises and for want of the use of the horses and cart, the plaintiff was unable to carry on his employment and business, and thereby lost great gains, &c. :—*Held*, on demurrer, that the declaration shewed no cause of action against S.

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plaintiff, and by and with the aid, counsel, and assistance of the said A. Stephenson, the other of the defendants to this suit, by him the said A. Stephenson wrongfully and maliciously given, heretofore, to wit, on &c., wrongfully and injuriously seized, took, and carried away, in execution of the said writ, divers goods and chattels of the plaintiff, to wit, two horses and one cart, and the harness and trappings of the same, of great value, to wit, of the value of 100*l*., under the pretence that the same belonged to the said R. Tiplady, and afterwards, to wit, on &c., sold the said goods and chattels, as and for an execution under the said writ issued against the goods of the said R. Tiplady: whereby and by means of the premises, and also for want of the use of the said horses, cart, harness and trappings, the plaintiff suffered great loss and damage, and was unable to carry on his said engagement, employment, and business, and thereby lost great gains and profits, &c.

The defendant Stephenson demurred specially to the declaration, on the grounds that it shewed no cause of action whatever against him: that it did not state with sufficient positiveness and certainty that Stephenson seized, took, and carried away, or sold the goods and chattels: that the declaration should have stated how and in what manner Stephenson aided, counselled, and assisted the said J. Walker: that the declaration was in an action on the case, whereas it ought to have been in an action of trespass *vi et armis*, and the same was an informal declaration *vi et armis*: that the plaintiff had complained against the defendants as if the alleged cause of action had been a mere consequential injury, whereas it appeared to have been an immediate and direct trespass committed to the property of the plaintiff.—Joinder in demurrer.

Manisty, in support of the demurrer.—It is impossible to tell whether this declaration is framed in trespass or case. It is not a good declaration in case. The charge

against Stephenson is, that Walker wrongfully and injuriously took the goods, with the aid, counsel, and assistance of Stephenson. There is no statement of the mode in which that aid, counsel, and assistance were given. Even if the nature of the aid had been stated, the declaration would not have disclosed a good cause of action in case. [*Parke, B.*—Would an action on the case lie for advising a person to seize the goods of another?] Certainly not. This declaration shews no distinct cause of action against Stephenson. The ground of complaint is the wrongfully and injuriously *taking* the goods; therefore the trespass is not waived. It is not a case of consequential damage properly so called, but a charge of trespass with special damage. The true distinction is, that, if there be a good cause of action exclusively of the trespass, the trespass may be waived, and case maintained; otherwise trespass is the only remedy: *Hemsworth v. Fowkes* (a).

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The Court called on

T. Campbell Foster to support the declaration.—This is a good declaration in case. Where consequential damage has resulted from an act of trespass, the party injured may waive the trespass and sue in case: *Moreton v. Hardern* (b), *Wells v. Ody* (c), *Branscomb v. Bridges* (d). In *Lear v. Caldecott* (e), the declaration stated, that the defendant took and distrained the growing crops of the plaintiff under colour and as and in the name of a distress for rent, which crops were sufficient to have satisfied the arrears of rent and costs, and that, although the defendant might under the said distress have satisfied the said arrears, yet he wrongfully and vexatiously made a second distress of the said growing crops, and upon other growing crops of the

(a) 4 B. & Adol. 440.

(b) 4 B. & C. 223.

(c) 1 M. & W. 452.

(d) 1 B. & C. 145.

(e) 4 Q. B. 123.

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plaintiff for the same arrears, and wrongfully and injuriously kept and withheld the said several growing crops from the plaintiff under the said second distress; and it was held that, although trespass might have lain for the injury alleged, yet the plaintiff was at liberty to sue in case, and that the above count was substantially in case. [*Parke, B.*, referred to *Smith v. Godwin (a)*.] It is not necessary or proper to state by what means Stephenson aided, counselled, and assisted Walker; to do so would be setting out in the pleadings that which is properly matter of evidence. Prolivity in pleading ought to be avoided: *Calvert v. Gordon (b)*.

PARKE, B.—The declaration is clearly bad against Stephenson: it does not shew that he took the goods. The allegation that Walker took them by his aid, would be supported if Stephenson lent him a horse, or told him how to get into the house in which the goods were. The plaintiff may enter a nolle prosequi as to the defendant Stephenson within a fortnight, otherwise judgment will be for him on the demurrer.

ALDERSON, B., and PLATT, B., concurred.

Rule accordingly.

(a) 4 B. & Adol. 413.

(b) 7 B. & C. 809.

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BENNETT v. BULL.

ASSUMPSIT for work and labour done by the plaintiff for the defendant at his request, and for commission and reward then due and of right payable by the defendant to the plaintiff in respect of the same.

Plea, that the work done by the plaintiff was done by him within the city of London as a broker, and that such work consisted in the making and entering into of certain bargains and contracts which were then and there made and entered into by the plaintiff as a broker for the defendant, to wit, certain bargains and contracts for the sale of certain shares of the defendant in "The Law Life Insurance Company," which shares were then and there bargained and contracted to be sold by the plaintiff as a broker for the defendant; and that the commission was a commission claimed by the plaintiff as a broker for and in respect of the making and entering into of such bargains and contracts as such broker as aforesaid: that the plaintiff was not, at the time or times of doing such work, or of making and entering into such bargains and contracts, or any of them or any part thereof, a broker licensed, authorised, empowered, or admitted, to act or practise as a broker in the premises or any of them, by the warden of the city of London, or by the court of mayor and aldermen of the city of London, or by any or either of them, or by any other lawful authority whatsoever, in pursuance of the statutes in such case made and provided.—Verification.

Replication, that the defendant of his own wrong, and without the cause by him in his plea alleged, broke his said promise, modo et formâ.

Special demurrer, assigning for cause, that the plea was not in excuse of the non-performance of the promise alleged, but that the promise was altogether illegal and void, and the plaintiff was never in a capacity to sue thereon,

A plea which admits a contract in fact, either express or implied, and seeks to avoid it on the ground of illegality or fraud, is a plea in excuse, and may be traversed by the replication *de injuriâ*.

Therefore, where to an action for work and labour the defendant pleaded that the work was done by the plaintiff as a broker within the city of London, and that the plaintiff was not licensed to act as a broker:—*Held*, that *de injuriâ* was a good replication.

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and therefore the replication de injuriâ was inadmissible.
 —Joinder.

Stammers, in support of the demurrer.—The promise alleged in the declaration is not an *express* promise, but one implied by law. It is well established, that where a party takes both by operation of law and by the act of man, the law shall prevail, and the act of man is void: *Haynsworth v. Pretty (a)*, *Reading v. Royston (b)*. The same principle applies to this case. Even though there may have been an express promise, it cannot avail, for the declaration shews facts from which a promise would be implied by law: 1 Wms. Saund. 264 b, note *e(c)*. Then the plea is not in excuse, but in denial of the promise which the law would otherwise imply from the facts stated in the declaration. [*Alderson*, B.—It admits a promise in fact, but denies its operation in law.] When the illegality is shewn by plea, the law will not imply a promise: this plea, therefore, cannot be in excuse of the non-performance of the promise, for none exists. In 2 Wm. Saund. 295 a, note *d(c)*, it is said, “But this replication is not to be allowed where the plea is in denial and not in excuse, as where it amounts to the general issue, or where, in *assumpsit* or debt, the plea amounts to a denial, either direct or argumentative, of the contract or the breach of it on which the action is founded.” [*Parke*, B.—The plea admits a contract in point of fact, but denies the plaintiff’s right to recover, because he had no license.] The plaintiff having acted without a license, the law will not imply a promise to pay him for his labour. In *Simons v. Lloyd (d)*, which was an action for work and labour, the defendant pleaded that the work was done by the plaintiff as an attorney, and that no signed bill had been delivered according to the statute, and it was held that de injuriâ was a bad replication to such plea. [*Platt*, B.—In *Cope v.*

(a) Cro. Eliz. 833.

(b) 1 Salk. 242.

(c) 6th ed.

(d) 7 Q. B. 402.

Rowlands (a), the plaintiff replied de injuriâ to a plea similar to the present.] In that case the objection was not taken.

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Atherton, contra.—The declaration is, no doubt, founded on an *implied* promise, but the later authorities have established this doctrine, that, where the plea admits the facts contained in the declaration, and shews an excuse for the breach alleged, de injuriâ is a good replication. *Isaac v. Farrar* (b) was an action of assumpsit by indorsee against maker of a promissory note, to which the defendant pleaded in substance, that the plaintiff was not a bonâ fide holder for value, and the Court held the replication de injuriâ good, inasmuch as the plea amounted only to matter of excuse for the non-performance of the promise. The present case is not distinguishable from that: this plea admits the contract, but shews that there never was any legal obligation to pay upon request. It was formerly doubted whether de injuriâ could be replied to a plea shewing fraud between the immediate parties to a negotiable instrument, but *Cowper v. Garbett* (c) decided that in such case the replication was admissible, even though the form of action was debt. The Lord Chief Baron, in delivering the judgment of the Court, refers to the general doctrine laid down by the Court of Queen's Bench in *Purchell v. Salter* (d), and says, "We all concur in thinking that the judgment of the Court of Queen's Bench upon this point was correct, and the reasons given at length by Lord *Denman* are quite satisfactory. It was argued in that case in the court of error, and also before us, that in debt on simple contract, or indebitatus assumpsit, there can never be a plea in excuse for the breach: that the action lies only where there is a complete debt; that there the debt is immediately payable, and the breach is surplusage, and that any allegation shewing that the debt is not due amounts to a denial of the debt

(a) 2 M. & W. 149.

(b) 1 M. & W. 65.

(c) 13 M. & W. 33.

(d) 1 Q. B. 200.

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itself. But we think that this argument is not well founded. In such actions there are pleas in excuse, as distinguished from pleas in discharge: pleas which confess a *prima facie* contract in fact, but avoid all liability upon such contract by some other matter, as, for instance, fraud or illegality of consideration, or that a note sued upon was made by way of accommodation." *Scott v. Chappelow* (a) also decided, that where a plea admits a contract in fact, but seeks to avoid it on the ground of illegality, *de injuriâ* is a proper replication. That was an action by the drawers against the acceptor of two bills of exchange, to which the defendant pleaded that an illegal company had been formed, and that he had accepted bills in furtherance of the purposes of the company; that the plaintiffs having become the indorsees and holders of two of such bills, it was agreed between the plaintiffs (having notice) and the company that the bills should be renewed; in pursuance of which agreement the company accepted the bills sued on, the defendant then being a member of the company, and upon no other consideration. *Tindal, J.*, says, "I think, under the circumstances stated in this plea, that *de injuriâ* is a good replication. The plea, as it appears to me, amounts to no more in substance than an excuse for the non-payment of the bills by the defendant, by reason of there having been no consideration for his acceptance of them, and to such a plea *de injuriâ* is a proper replication. *Coltman, J.*, says, "No case has been cited to establish that where a plea shews that the contract declared upon is void by law, *de injuriâ* is an improper replication. Now this plea clearly goes in avoidance of the contract. There are some *dicta*, indeed, which appear to raise a doubt whether that replication is proper in such a case, but there does not appear to be any decision on the subject." *Garten v. Robinson* (b), although not an express decision in point, has still some bearing on the present case. That was an action for

(a) 4 Man. & G. 336; 5 Scott, N. R. 148.

(b) 2 Dowl. N. S. 41.

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goods sold and delivered, to which the defendant pleaded that the goods were smuggled tobacco, and it was held that, although the plaintiff might reply *de injuriâ* to such plea, he was not bound to do so. In the case of *Humphreys v. O'Connell* (a), *Parke*, B., refers to *Noel v. Rich* (b), where the Court held the replication *de injuriâ* good, although the plea sought to avoid the contract on the ground of fraud. No distinction can be drawn between the present case and *Lansdale v. Clarke* (c), in which this Court held that *de injuriâ* might be replied to a plea setting up a defence under the Tipling Act, (24 Geo. 2, c. 40, s. 12). In *Simons v. Lloyd* (d), which is relied upon by the other side, the judgment of the Court proceeded on the ground, that although the plea admitted a breach of the promise, it offered no excuse for it, but suggested only an impediment to the bringing of the action.

Stammers, in reply.—The form of the replication makes it necessary that there should be a promise either express or implied. Here there is no express promise, and in this case the law will not imply one. With the exception of *Lansdale v. Clarke* (c) and *Garten v. Robinson*, the cases cited on the other side were actions on bills of exchange or promissory notes, in which there was an express promise on the face of the instrument. *Garten v. Robinson* has no bearing on the present question; and *Lansdale v. Clarke* probably turned on the particular language of the Tipling Act. The *dicta* of the Court in *Humphreys v. O'Connell* and *Parker v. Riley* (e) are in favour of the defendant. In *Solly v. Neish* (f), which was an action for goods sold and delivered, the Court held that *de injuriâ* could not be replied to a special plea which amounted in effect to the general

(a) 7 M. & W. 370.

(e) 3 M. & W. 230.

(b) 2 C., M., & R. 360.

(f) 2 C., M., & R. 355; 4

(c) Ante, p. 78.

D. P. C. 248.

(d) 7 Q. B. 402.

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issue. Lord *Abinger*, C. B., in delivering the judgment of the Court, says: "The replication appears to be bad for two reasons: first, the plea does not contain matter of excuse, but a denial of the promise; and it cannot put the matter in the plea in issue, for it denies only the cause of the breach of promise. The plea, however, does not admit and excuse a breach of promise; but it denies that any promise at all was made to the plaintiff." [*Alderson*, B.—The Courts have gradually become more liberal in allowing the use of the general replication *de injuriâ*. When the new pleading rules were first introduced, there was great difficulty in ascertaining their effect; so that a new system has been gradually forming.] *Crogate's case* (a) shews that there must be an existing promise, upon which the replication *de injuriâ* can take effect. *Simons v. Lloyd* is in favour of this view; for until a signed bill has been delivered, there is no promise to pay. [*Alderson*, B.—The promise exists, only it cannot be enforced by law. It is the same with respect to a release. *Parke*, B.—The Statute of Limitations would begin to run, although no signed bill had been delivered: that could not be if there was no promise.]

PARKE, B.—I am of opinion that the replication is good, and that our judgment ought to be for the plaintiff. In the earlier cases on this subject, before the Courts became familiar with this form of replication as applicable to actions of *assumpsit*, doubts were expressed whether *de injuriâ* could be replied to a plea, which, instead of confessing the contract, and shewing matter of excuse, stated facts which avoided the contract itself. In the case of *Humphreys v. O'Connell*, I expressed a doubt whether a plea shewing fraud between the parties to the contract could be traversed by the general replication *de injuriâ*. The same doubt was

(a) 8 Rep. 66 b.

entertained in the case of *Parker v. Riley*. Subsequent cases have put an end to that doubt, particularly the case of *Scott v. Chappelow*, in the Court of Common Pleas, which has been followed by *Lansdale v. Clarke* in this Court. Those cases have settled the law upon this footing, that inasmuch as in actions of assumpsit the plea of non-assumpsit denies only the express promise, or the matters of fact from which a promise can be implied by law, a plea which admits a contract in fact either express or implied, and seeks to avoid it on the ground of illegality or fraud, is a plea in excuse, and may be traversed by the replication *de injuriâ*. Such I conceive to be the rule on the authority of the more recent cases, and consequently the present replication is good. With respect to the case of *Simons v. Lloyd*, which was an action on an attorney's bill, the plea was clearly not in excuse for the non-performance of the contract. The delivery of a signed bill is by statute a condition precedent to the commencement of the action; and a plea of its non-delivery is not properly the subject of a replication *de injuriâ*, for the plea is not in excuse of the breach of contract,—in truth, it admits a breach, but insists that the plaintiff was not at liberty to commence the action, because he had not complied with a statutory provision. I may observe with respect to *Solly v. Neish*, that there is nothing in that case which militates against the present decision, because there the Court said that the plea was not in excuse for the non-performance of the contract; for, although the money mentioned in the declaration had been received by the defendant, yet the facts stated in the plea went to shew that there was no implied contract at all between him and the plaintiffs, because the money never had been received by the defendant for the use of the plaintiffs, but with their concurrence for the use of some one else. With reference to that state of facts, the Court said that the plea did not shew matter of excuse for the non-performance, but a denial of the promise, and on that, and also on another

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ground mentioned in *Crogate's case*, the replication de injuriâ was held inapplicable.

ALDERSON, B.—I also think this replication good. The use of this form of replication follows from the restriction which the new system of pleading has put on the plea of non assumpsit. Formerly, non assumpsit denied not merely the fact of a promise, but its operation, namely, that it was a binding promise. But the new rules have confined that plea to a denial of the promise, that is, either of the express promise, or of those circumstances out of which an implied promise arises. The moment it is established that a defendant cannot, under non assumpsit, give evidence of fraud or illegality, then that fraud or illegality is an excuse for the non-performance of the promise, and de injuriâ may be replied.

ROLFE, B., concurred.

PLATT, B.—The plea sets up matter of excuse for the non-performance of the promise. If the defendant had pleaded non assumpsit, the plaintiff at the trial must have proved those facts from which the law would have implied a promise to pay. This plea, therefore, admits those facts, but avoids the obligation which the law would imply from them. The defendant in truth says: "I admit the facts and the implication of law arising therefrom, but I excuse the breach of the implied promise for the cause in the plea assigned." To that the plaintiff may well reply de injuriâ.

Judgment for plaintiff.

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Dec. 9.

EVANS and Others v. POWIS.

DEBT.—The first count of the declaration was on a bill of exchange drawn by the plaintiffs upon and accepted by the defendant for payment of £30. The second count was on a similar bill, for payment of 41*l.* 16*s.*

Plea, as to the supposed causes of action in the first count, so far as the same relate to the sum of 13*l.* 3*s.* 2*d.*, parcel of the sum of £30 in the first count mentioned, and as to the supposed causes of action in the second count, that after the accruing of the supposed causes of action in the introductory part of this plea mentioned, and before the commencement of this suit, to wit, on &c., the defendant was in bad and embarrassed circumstances, and indebted to the plaintiffs in respect of the causes of action in the [introductory part of this plea mentioned, in a certain sum of money, to wit, the sum of 54*l.* 19*s.* 2*d.*, and to a certain other person, to wit, one Edwin Bliss, in a certain other large sum of money, and was unable to pay the plaintiffs and the said E. Bliss respectively their debts aforesaid in full, whereof they then had notice, and thereupon, to wit, on &c., the defendant then offered and agreed with the plaintiffs and the said E. Bliss to pay to them respectively, and the plaintiffs and the said E. Bliss then mutually agreed

To counts by drawer against acceptor of two bills of exchange for 30*l.* and 41*l.* 16*s.*, the defendant pleaded as to 13*l.* 3*s.* 2*d.*, parcel of the sum of £30 in the first count, and also, as to the second count, that he the defendant was in embarrassed circumstances, and indebted to the plaintiff in respect of the causes of action in the introductory part of the plea mentioned in the sum of 54*l.* 19*s.* 2*d.*, and to one B. in a certain other sum of money, and was unable to pay the plaintiff and B. their debts in full, and thereupon the defendant

agreed with the plaintiff and B. to pay them respectively; and the plaintiff and B. then mutually agreed with each other and the defendant to accept of him 10*s.* in the pound as a composition upon and in full satisfaction and discharge of their respective debts. The plea then averred readiness and willingness to pay, with a tender of the amount of the composition, and concluded with payment of it into court. The plaintiff replied, traversing the agreement to accept the composition of 10*s.* in the pound in satisfaction and discharge; upon which issue was joined. At the trial the agreement proved was to accept a composition of 10*s.* in the pound, payable in *certain sums on certain days*. It also appeared that default had been made in payment of the instalments. The learned judge, at the request of the defendant's counsel, amended the plea accordingly:—*Held*, that the plea, as amended, was bad, even after verdict, for not stating that the payments were made at the precise times agreed on, or at least a tender made of them.

Semble, that, if the plea had been that a new mutual agreement between plaintiff, defendant, and other creditors, binding on each at the time when it was made, was given as a substitution for, or in satisfaction of, the debt due from the defendant to the plaintiff, such plea would have been good, and in that case it would have been for the jury to decide whether the plaintiff agreed to accept the *agreement* itself, not the performance of it, as a satisfaction for his debt.

A judge at Nisi Prius ought not to amend a pleading, if the effect of the amendment would be to render the pleading demurrable.

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with each other and with the defendant to accept of him 10*s.* in the pound as a composition upon and in full satisfaction and discharge of their respective debts.] And the defendant further saith, that the composition or sum of 10*s.* in the pound on the said sum of 54*l.* 19*s.* 2*d.* amounts to a large sum of money, to wit, the sum of 27*l.* 9*s.* 7*d.*, and that the defendant at the time of making the agreement in this plea mentioned, was, and always from thence hitherto hath been and still is, ready and willing to pay to the plaintiffs the said composition on the said sum of 54*l.* 19*s.* 2*d.* And the defendant further saith, that after the making of the said agreement, and before the commencement of this suit, to wit, on &c., he the defendant was ready and willing and then tendered and offered to pay to the plaintiffs the said sum of 27*l.* 9*s.* 7*d.*, being the composition of 10*s.* in the pound on the said sum of 54*l.* 19*s.* 2*d.*, to receive which of the defendant the plaintiffs then wholly refused, and the defendant now brings here into court the said sum of 27*l.* 9*s.* 7*d.*, ready to be paid to the plaintiffs if they will accept the same.—Verification.

Replication, that the defendant did not agree with the plaintiffs and the said E. Bliss to pay them respectively, nor did the plaintiffs and the said E. Bliss agree with each other and with the defendant to accept of him 10*s.* in the pound as a composition upon and in full satisfaction and discharge of their respective debts, modo et formâ: upon which issue was joined.

The cause was tried before *Parke*, B., at the London sittings in Trinity Term, 1847, when the evidence adduced did not support the plea, but the agreement proved was to accept a composition of 10*s.* in the pound payable in certain sums on certain days. It appeared that default had been made in payment of the instalments. The defendant's counsel applied for leave to amend the plea by making it conformable to the evidence. The learned judge permitted the amendment, and a verdict was

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found for the defendant. The plea, as amended, contained the following allegations, instead of that portion of the above plea within brackets:—"first and second counts mentioned, and to a certain other person, to wit, one Edwin Bliss, in a certain other large sum of money, and was unable to pay the plaintiffs and the said E. Bliss respectively their debts aforesaid in full, whereof they then had notice, and thereupon, to wit, on &c., the defendant then offered and agreed with the plaintiffs and the said E. Bliss, to pay to the plaintiffs 11*l.* 16*s.* 10*d.* in part of the said debts in the first and second counts mentioned, and to pay to the plaintiffs and the said E. Bliss, and the plaintiffs and the said E. Bliss then mutually agreed with each other and with the defendant, that the defendant should pay to them, and they should accept of him, 10*s.* in the pound as a composition upon and in full satisfaction and discharge of the residue of the plaintiffs' said debt and of the debt of the said E. Bliss, at the times and in manner following, that is to say, £5 on the first day of April, £5 on the first day of May, 7*l.* 10*s.* on the first day of June, £10 on the first day of July, £10 on the first day of August, 7*l.* 10*s.* on the first day of September, £5 on the first day of October, and £5 on the first day of each succeeding month, until the whole should be paid."]

J. Brown had obtained a rule nisi for a new trial, on the ground that the plea as amended was open to demurrer, and consequently the amendment ought not to have been allowed.

Bramwell shewed cause (Nov. 3.).—It is conceded that the amendment ought not to have been allowed, if its effect were to render the plea bad on demurrer. But the amended plea is good, at least after verdict. There is no stipulation that the original debt should revive on default in payment of the instalments. It will perhaps be argued that such a

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consequence follows as a matter of law. But these agreements are not valid merely as agreements between party and party, but on the ground that each of the creditors consents to give up the right which he has of enforcing the original contract. If the non-payment of an instalment were to render the agreement void quoad the particular creditor unpaid, the result would be, that the debtor might give a preference to any one creditor. *Cumber v. Wane* (a) has no application to the present case; for in that case there was no third party to the agreement.

J. Brown, in support of the rule.—On default in payment of any of the instalments, the original debt revives, though there be no express stipulation for that purpose. Such is the legal effect and construction of the agreement. No particular words are requisite to make a condition precedent or subsequent: 1 Chit. Plead. 331 (b); Com. Dig. tit. "Condition" (A. 2). The terms of this agreement necessarily imply that the original debt shall remain until payment of the composition. The agreement does not per se extinguish the debt, but only the performance of it. In *Thomas v. Courtnay* (c), the creditors of an insolvent agreed by an instrument (not under seal) that they would accept, in full satisfaction of their debts, twelve shillings in the pound, payable by instalments, and would release him from all demands. One of the creditors, who signed for the whole amount of his debt, held at the time, as security for part, a bill of exchange drawn by the debtor, and accepted by a third person. The money due on this bill having afterwards been paid by the acceptor, it was held that the creditor might retain it, the agreement of composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt.

(a) 1 Str. 425.

(b) 7th ed.

(c) 1 B. & Ald. 1.

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Many authorities are collected in Smith's Leading Cases (*a*), in the note to *Cumber v. Wane*, which shew, that unless the debtor strictly performs his part of the agreement, the creditor is remitted to his original rights. In *Ex parte Bateson* (*b*), it was held that an agreement for a composition payable by instalments did not preclude the creditor, on default in payment of the instalments, from proving under a fiat for the balance of the original debt. Sir *G. Rose* there says—"If the whole of the composition of five shillings in the pound had been paid pursuant to the agreement, the case might have been different; but as default was made in payment of the composition, the creditor has a right to resort to the original debt. The principle on which these cases of composition have been long settled is, that the mere agreement to accept a composition does not amount to a release of the debt, unless the composition is fully paid." It is true, that, in composition deeds, it is usual to insert a clause that the original debt shall revive, if default be made in payment of the instalments; but the reasons of that are, that the simple contract debt would otherwise merge in the specialty, and that such deeds in general contain a release to the debtor. The precedents of pleas of this nature aver performance by the debtor of the terms of the composition (*c*). If any action would lie by a creditor for the breach of a composition agreement, some such case would be found in the books; but the invariable practice has been to sue on the original contract. In *Lynn v. Bruce* (*d*), where the plaintiff declared on an agreement to accept from the defendant a composition on a debt, it was held that such a mere accord gave no new ground of action. That principle was recognised and confirmed in *Reeves v. Hearne* (*e*). The same law is found in Forsyth's Composi-

(*a*) Vol. 1, p. 150.(*d*) 2 H. Blac. 317.(*b*) 1 M., D. & De Gex, 289.(*e*) 1 M. & W. 323.(*c*) 3 Chit. Plead. 87, 96.

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tion with Creditors(*a*). *Rosling v. Muggeridge*(*b*) is also an authority to shew that this plea is bad.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case there was a special plea of accord and satisfaction to a part of the first count, and to the second. On the trial, the plea was not proved, and the plaintiffs were entitled to a verdict; but on the application of the defendant's counsel, I permitted an amendment. The plea as amended was proved, and the question is, whether I was right in permitting the amendment.

It was admitted on both sides, and very properly admitted, that if the amendment made the plea demurrable, I ought not to have made it; and for this reason, that, as the plea stood, the plaintiffs would have succeeded, and had the costs of the pleading and proof of that issue; but when amended they could not demur to the plea, and on the issue which they were bound to take the plea would be proved, and they would be driven to a motion for judgment non obstante veredicto, which, when obtained, would have left them without the costs of that issue. We agree that no amendment ought to be allowed which would make a bad plea, and put the plaintiffs in this disadvantageous condition.

The question then is, whether the plea, as amended, was demurrable, and we are all of opinion that it was. [His Lordship stated the amended plea.]

There cannot be a good accord and satisfaction of the whole of a liquidated debt, as this is, by payment of part, unless there be a good consideration for giving up the remainder; consequently, when the plea is that a less sum was given in satisfaction for a greater, such a consideration must be averred.

(*a*) P. 24.

(*b*) 16 M. & W. 181.

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In this case the consideration for relinquishing the residue and receiving ten shillings in the pound in full, is the binding engagement of another creditor to receive his debt in the same way. Both creditors having had a right to be paid in full, and each a chance of being paid more than the other if he pressed the debtor, each mutually agrees with the other to forego that right and chance, and be content with less; and the engagement of one creditor to take a smaller sum, is the consideration for the engagement of the other to do the same. There is, therefore, on the face of the plea a good consideration for the plaintiff's abandoning a part and taking the remainder. In that respect the plea is good; but the accord as to the remainder is that the satisfaction shall be by *certain* payments at *certain* times, and unless these payments are made at these precise times, the satisfaction is not made in the manner provided for by the accord. The plea does not state that the payments were so made, and therefore is bad.

If the plea had been that a new mutual agreement between the plaintiffs and defendant and the other creditors, binding on each at the time when it was made, was given as a substitution for or satisfaction of the debt due from the defendant to the plaintiff, we think such a plea would have been good, on the authority of Comyns' Digest, "Accord" (B. 4), *Case v. Barber* (a), *Good v. Cheesman* (b), and other authorities referred to in a note of the late Mr. Smith in the first volume of "Leading Cases" (c); this not being a mere accord between the same parties with mutual promises, but a new agreement with new consideration pleaded. If so, the question would have been for the jury to decide whether the plaintiff agreed to accept the *agreement* itself, not the performance of it, as a satisfaction for his debt, so that if it was not performed, his only remedy

(a) T. Raym. 450; T. Jones, 158.

(b) 2 B. & Adol. 328.

(c) P. 160.

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would be by an action for the breach of it, and not a right to recur to the original debt. Whether such a plea would have been proved is very doubtful.

But this plea is not so framed—it is a plea of accord, not to take the new agreement, but the payment of ten shillings in the pound on the balance at the stipulated times in *satisfaction*, and satisfaction should have been averred by payments agreed upon by the accord, or at least a tender of such payments should have been alleged. This not having been done, this plea is bad, and consequently I ought not to have made the amendment. Therefore, this rule must be absolute.

Rule absolute.

Dec. 7.

ARTHUR v. BEALES.

To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, that before the bill became due, the plaintiff indorsed the same to a person unknown, who held the same by virtue of such indorsement thence until and at the time when the same became due, and has ever since remained and still is such indorsee, to whom as such

ASSUMPSIT against the defendant as acceptor of a bill of exchange for £30, payable to the order of William Corbett three months after date, and indorsed by William Corbett to the plaintiff.

Plea: that the indorsement was a direct indorsement from W. Corbett, by whom the bill was delivered so indorsed to the plaintiff, who then and before the same became due (the same being payable to order, and transferable by indorsement and delivery), indorsed and delivered the same to a certain person, whose name is to this defendant unknown, and who held the same by virtue of such indorsement thence until and at the time when the same became due, and has ever since remained and still is such indorsee as aforesaid, to whom, as such indorsee, the defendant has ever since been and still is liable to pay the amount. Replication, that the plaintiff, at the time of the commencement of the suit, was the indorsee and holder of the bill, without this, that the person in the plea mentioned was, at the time of the commencement of the suit, holder of the bill in manner and form as in the plea alleged:—*Held*, on special demurrer, that the replication was good.

ant has ever since been and still is liable to pay the amount of the said bill, the said bill never having been indorsed to the plaintiff, save in manner and form as in this plea hereinbefore in that behalf mentioned: Verification.

Replication: that the plaintiff, at the time of the commencement of this suit, was the indorsee and holder of the bill in the declaration mentioned, without this, that the person in the plea in that behalf mentioned was, at the time of the commencement of this suit, indorsee of the bill in manner and form as in the plea alleged; concluding to the country.

Special demurrer, assigning for causes (amongst others) that the replication neither traversed nor confessed and avoided the material allegations in the plea; that by the plaintiff's indorsement of the bill to a third party, the defendant became discharged from performing the promise declared on, and was bound to pay the bill, not to the plaintiff, but to such third party; that the replication was an argumentative traverse of those allegations; that the replication should either have denied that the plaintiff indorsed the bill, or have shewn affirmatively when and in what manner the plaintiff re-acquired title to sue thereon, and should have concluded with a verification, and not to the country.

Fortescue, in support of the demurrer.—The plea affords a *prima facie* answer to the declaration, by shewing that the plaintiff indorsed away the bill, and that it was in the hands of a third person at the time it became due. The replication admits those facts; consequently, the promise declared on was discharged before breach. *Schild v. Kilpin* (a) shews that such a plea is not in excuse but in denial of the breach. If the plaintiff relies upon a subsequently acquired title, he should either have declared on a dif-

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(a) 8 M. & W. 673.

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ferent promise, or have shewn in his replication how such new title was acquired: *Bartlett v. Benson* (a). By this form of replication the defendant is deprived of the means of questioning the plaintiff's title in a rejoinder. The bill, when it became due, might have been in the hands of a third party, against whom the defendant had certain equities, subject to which the plaintiff would take it: *Burrough v. Moss* (b). Or the bill might have been lost by the holder after it was due, and found by the plaintiff. [*Parke, B.*—The case of *Fraser v. Welch* (c) is in point.] That was an action by indorsee against drawer, in which case the declaration alleged notice of non-payment by acceptor, and a promise by defendant to pay *on request*. Here the action being against the acceptor, the promise declared on is to pay the bill *when due*. That promise is discharged, inasmuch as the plaintiff was not the holder when the bill became due. [*Parke, B.*—Still the answer is the same. The plea is, that the plaintiff has transferred his right to sue; the replication is, that he has not transferred it. There is no distinction between the two cases.]

PER CURIAM (d).—There must be judgment for the plaintiff.

Willes appeared to argue in support of the replication.

Judgment for the plaintiff.

(a) 14 M. & W. 733.

(b) 10 B. & C. 558.

(c) 8 M. & W. 629.

(d) *Parke, B., Alderson, B., Rolfe, B., Platt, B.*

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

SIDEBOTTOM v. The COMMISSIONERS of the GLOSSOP
RESERVOIRS.

Dec. 1.

THE plaintiff having brought a writ of error on the judgment of the Court of Exchequer in this case (a), it was now argued (b) by

Welsby, for the plaintiff in error.—The question for the consideration of this Court is, whether, upon the construction of the 38th section, and upon the whole purview of this act of Parliament, all three reservoirs should not have been made and in use and water supplied therefrom, as a condition precedent to the right of the commissioners under the act to make and levy a rate. The Court below held that the completion of *one* reservoir alone was sufficient to give this power. Now, this act of Parliament, both from its title and general scope, regards *one* entire great work, for the advantage and benefit of *all* the occupiers of mills and works upon the three several streams mentioned. The rate is to be levied upon *all* such occupiers, in proportion to the benefit they derive from the work. The preamble recites the inconvenience felt by the occupiers of mills on the three

To an action of trespass for breaking and entering plaintiff's mill and taking his goods, the defendants pleaded a justification under 1 Vict. c. lxxix. (local), that defendants, as commissioners under the act, completed *one* of three reservoirs mentioned therein; that plaintiff's mill was benefited by the supply of water therefrom; that a certain rate was made, and that the trespass was committed and the goods were taken as a distress for non-payment of the rate. The

plaintiff replied, that only *one* reservoir had been completed. General demurrer. The 38th section enacts, that "no rate shall be levied or assessed under the provisions hereinbefore contained until *the said reservoirs* shall be actually made and in use, and water supplied therefrom:—"—*Held*, on error in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer), that, upon the true construction of the act, the completion of *one* reservoir entitled the commissioners to levy a rate on the class of persons mentioned in the act actually benefited by it; and therefore that the plea was good.

(a) Ante, p. 177.

(b) Before *Wilde*, C. J., *Cole-ridge*, J., *Coltman*, J., *Maule*, J.,*Wightman*, J., *Erie*, J., and *Williams*, J.

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streams from the inadequate supply of water, and the great convenience which would result from the construction of three reservoirs. The 2nd section provides for the appointment of new commissioners in the place of others in case of vacancy, to be elected from *all* the occupiers of the tributary streams, &c. By the 10th section, proper books of accounts are to be kept, to be open to all persons benefited by the works. The 13th section applies to the occupiers of all the streams, rivers, and falls. The 18th section contains no distributive words whatever. The 31st section throughout speaks of all the three reservoirs. The 33rd section clearly supposes three reservoirs in existence. It does not state that a rate shall be levied upon *any* person who shall occupy any part of the said tributary streams, &c., but upon *all*. The 38th section, upon which this question mainly turns, contains no distributive words whatever. It does not contain the words, "the said reservoirs *respectively* or *any* of them." There is nothing in that section to lead to any other conclusion than that *all* the reservoirs are intended to be first completed before the rate is to be made. By the completion of the works, the benefit of all the occupiers is contemplated. The commissioners have the period of ten years for the completion of the works, by the 72nd section, and by the 47th they are empowered to borrow £15,000. It may be urged that it is a hardship on the parties who advance the money, if they are not to be reimbursed until after the completion of the entire works; but they know what the bargain is upon the faith of which they advance the money, and, moreover, they are, by the 46th section, to receive interest. The 34th section will be relied upon by the defendants, which provides for separate rates; but as the rate is to be in proportion to the benefit received, the rates must necessarily be different. [*Coleridge, J.*—The 34th section applies to each of the three reservoirs; it clearly applies to separate rates with respect to each separate reservoir.] That is to be understood to mean after the completion of them all. The 39th section contains

distributive words; the legislature therefore has used those words where they were necessary.

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Hoggins, contra.—The 38th section is the one upon which the plaintiff relies. In order to support his position, it would be necessary to import the word “all” into that section. The different occupiers are to be rated in proportion to the individual benefit they receive. There is no necessary connexion between the different reservoirs. The preamble of the act no doubt reviews the whole of the works. But the 33rd section provides for the inquiry into the particular benefit each person receives. The object the legislature had in view was the benefit each party was to receive by the completion of each separate reservoir. One reservoir has been made, and the plaintiff has been benefited by it, which is not denied, and therefore the commissioners were justified in making the rate. The decision of the Court below was correct, and ought to be affirmed.

Welsby replied.

WILDE, C. J.—We are all of opinion that the judgment of the Court below is right, and that that judgment ought to be affirmed. The argument of the plaintiff in error seems to be mainly founded upon the 38th section of the act of Parliament in question. By that section it is provided, “that no rate shall be levied or assessed, under the provisions hereinbefore contained, until the said reservoirs shall be actually made and in use, and water supplied therefrom.” And it is argued, that the proper construction of the act, or rather of that clause, is, that *all* the said reservoirs must be made as a condition precedent to the power of making the rate. Some difficulty, no doubt, might arise if that clause stood alone, but that clause must of course be construed with reference to the object of the act of Parliament, and with regard to the several other clauses which it

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contains. On looking to the other sections of the act, it certainly appears to us that no reasonable doubt can be entertained that the 38th clause ought thus to be construed—that no rate shall be levied or assessed under the provisions of the act until *some reservoir* shall have been actually made and in use and water supplied therefrom. This act of Parliament, as appears from a variety of clauses which have been adverted to in the argument, clearly was passed upon the idea that separate benefits and advantages would be derived by separate districts from distinct works; and although it says in section 38 that no rate shall be levied until the said reservoirs are made, yet it appears by other sections that whenever a rate is to be made, it is to be a separate rate. There is no period at which one common rate is to be made upon the entire district. Section 33 gives a power to rate persons who shall occupy any part of the tributary streams which are there described, *or* such other part, *or* such other part, *or* such other part, and not upon persons who shall occupy such a position *and* such another, *and* such another, *and* such another, but *or* the one *or* the other. When that clause is read in connexion with the 34th, which provides that separate rates in the proportions thereinbefore mentioned are to be made, levied, and assessed by the commissioners for and in respect of the said reservoirs thereby authorised to be made, and separate and distinct accounts are to be kept of all monies secured, &c., it appears that *separate* rates are to be made. How are these separate rates to be made? What is to be the rule by which their separate character is to be preserved? We find that distinctly provided for by the proportions which are to be observed in imposing the rates upon the separate districts. In one district a full rate is to be imposed upon all persons who shall occupy any fall upon the tributary streams, and upon persons who shall occupy other places which are mentioned two-thirds, and persons who shall occupy another place mentioned one-fourth of a full rate. Accounts are to be

kept—*separate* and *distinct* accounts—of all monies laid out and expended by the said commissioners on account of *each* of the said reservoirs. The attention of the legislature was most distinctly directed to each separate reservoir, for which they have directed separate rates to be made. This is also apparent from the consideration of the 39th section, which requires the commissioners to appoint inspectors; and these inspectors are to ascertain the relative degree and proportion of the benefit and advantage which mills, factories, &c., receive on the different levels, and also to ascertain, in cases where there are concurrent occupiers on the same levels, the relative value of the benefit received by each of such concurrent occupiers. It appears, therefore, that the legislature contemplated distinct interests, distinct benefits, to be derived by each occupier upon each separate level. When we find that this work is to be carried on by money to be borrowed, it seems impossible to construe the act in such a way as will afford a reasonable opportunity of carrying on the work, and at the same time as will be consistent with the argument of the plaintiff in error. It appears by section 72, that if all the works are not completed within ten years, then all the powers of the act are to cease. To what extent are they to cease? The section goes on to say that the powers of the act are to cease as to all such and so much as shall not be completed, but without prejudice to all or any of the rights, powers, and privileges, as to such and so much of the said works as shall have been completed. Persons from whom money is borrowed are to be paid out of the money raised by these rates. The 34th section, to which my Brother *Coleridge* called attention during the course of the argument, requires separate accounts to be kept of the monies secured on account of each of the said reservoirs. Now, if separate rates could not be made upon the completion of any of these separate reservoirs, what security would the mortgagee have? How could it be supposed that any

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money could be raised? It seems to be the intention of this act that a person should be under the obligation to pay as soon as he has received any benefit, and in proportion to the degree of benefit which shall be conferred. It is therefore impossible to give effect to the intention which this act of Parliament clearly discloses, unless we hold, that when *one* reservoir is completed and water supplied therefrom, and benefit is also derived, the persons who have works upon the respective tributary streams which are so supplied with water by such reservoir, shall be liable to be rated.

It seems to us, therefore, that, upon looking at the whole of the act, we put a reasonable construction upon the 38th section, by holding that no rate is to be made until some reservoir is completed which shall supply actual benefit to those persons who have works upon the streams connected with it; and that it would be inconsistent with the object of the legislature, and the beneficial construction of the act with reference to that object, to hold that no rate can be made until the whole of the reservoirs shall be completed. It seems to us, therefore, that the judgment of the Court of Exchequer was quite correct, and that it ought to be affirmed.

Judgment affirmed.

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BAILDON, Executor of ELIZABETH CRAVEN, Deceased, v.
WALTON.

Dec. 2.

ERROR on a bill of exceptions.—The action was in assumpsit for money lent by the testatrix to the defendant, for interest thereon, and on an account stated with the testatrix, stating a promise to the testatrix in her lifetime. The declaration also contained similar counts, stating a promise to the plaintiff as executor, and also a count upon an account stated with the plaintiff as executor. Pleas, non assumpsit, and the Statute of Limitations.

The cause came on for trial before *Pollock*, C. B., at the Middlesex sittings after Michaelmas Term, 1844.

The plaintiff's counsel gave sufficient evidence in support of the affirmative of the issue joined on the plea of non assumpsit, so far as the same related to the first three counts of the declaration. In support of the affirmative of the residue of that issue, and also of the issue joined on the plea of the Statute of Limitations, they proved the following facts:—The testatrix, Elizabeth Craven, died on the 19th June, 1843, before the commencement of this suit. She never was married. In the year 1817, the defendant wrote and sent to her a letter containing the following passage:—"I forgot to say *I shall allow you 5 per cent. for the money*, and perhaps in my next I shall send you proposals for sinking it if you wish." On the 14th December, 1817, the defendant wrote and sent to the testatrix another letter, in which he stated as follows:—

"Dear Miss Craven,—I have received the parcel, and suppose all is right, but I have not had time to look them

In an action by an executor, for money lent by his testatrix to the defendant more than six years before the commencement of the suit, to which there was a plea of the Statute of Limitations, it was proved, that, within six years before the commencement of the suit, the plaintiff filed a bill against the defendant for a discovery and account, and the defendant in his answer admitted the payment by him to the testatrix of half-yearly payments of 8*l.* 10*s.* each, down to a period within the six years; but alleged that they were paid, not as interest upon a debt, but by way of annuity for the life of the testatrix, in pursuance of an agreement made between them at a period when the testatrix gave the defendant a

sum of £340:—*Held*, that the jury were at liberty to reject the latter part of the statement, and that the answer might be construed by them merely as admitting the payment of the money, and that the appropriation of it, as interest upon the debt sued upon, might be proved by other evidence.

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over. The former parcel of half-bills were for £235. I will acknowledge the whole amount when I next write to you, and at which time I will send you my proposals."

On the 2nd December, 1818, the defendant wrote and sent to the testatrix the following letter:—

"I shall not say anything about your uncle and the money now; you might easily have evaded the question. However, when I see you, I will make an arrangement respecting it. On the other half of this letter I send you a statement as a memorandum, which you can cut off; it is up to Midsummer Day, so *your interest* will now be due again very soon, and the interest up to that time, as near as I could calculate, was £8. I have put £2 to the interest, which will now make the whole debt £300, so you will have to receive 7*l*. 10*s*. at Midsummer and Christmas, which will be 5 per cent., or £15 per year."

On the other half-sheet of this letter was written the following memorandum of account:—

1818.	£	s.	d.	1817.	£	s.	d.
June 25, To interest	8	0	0	Oct. 1, By bank note	25	0	0
Cash .	2	0	0	Nov. 25, Ditto .	30	0	0
Balance .	290	0	0	Dec. 16, Ditto .	235	0	0
				June 25, Interest and			
				cash .	10	0	0
	£300	0	0		£300	0	0

On the 21st June, 1819, the defendant wrote and sent to the testatrix a memorandum signed by him, as follows:—

"Received of Miss Craven, 21st June, 1819, the sum of Twenty Pounds.

"THOMAS W. WALTON."

On the 27th August, 1819, he sent her a similar memorandum, expressing the receipt by him from her, on that

day, of another sum of £20. On the 7th September, 1819, the defendant wrote and sent to the testatrix a letter, in which was the following passage:—

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“I have sent the amount of your half-year's *interest*. There is £2 I advanced last Christmas to make up the even sum, which I shall deduct at some future period, but never mind it at present. I send you seven pounds, and will give you the ten shillings when I see you.”

Again, on the 25th July, 1820, the defendant wrote to her as follows:—

“London, July 25th, 1820.

“You will please say when you shall want your *interest*, and I will send it.”

On the 21st June, 1822, he wrote to her as follows:—

“London, June 21st, 1822.

“I am going about three weeks' journey into Kent, and when I return, shall send your half-year's *interest*, or else pay it you when I am round in the latter end of August. If you should want any money, of course you will apply to Laxon for what you want till I see you. I think you told me that the £200 was to be paid in this spring; has it been so? It is not improbable that I may want it, as I am now about a business, but have concluded nothing positive about it.”

On the 26th August, 1822, the defendant again wrote to her as follows:—

“London, August 26th, 1822.

“I hope you have not failed to make the application for the money, as I directed you, for I must know if I am to be on a certainty; it will not do to be disappointed of it, when I have given my securities for taking the business.”

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On the 24th December, 1831, the defendant wrote and sent to her the following note:—

“Miss Craven will receive 8*l.* 10*s.* with this, and she will be kind enough to send her address when she writes.

“Derby, December 24, 1831.”

A bill in Chancery, filed by the plaintiff against the defendant, dated 16th December, 1843, and the defendant's answer thereto, sworn on the 28th February, 1844, were also given in evidence on the part of the plaintiff. The bill set forth, that previously to and in the month of December, 1818, the defendant was indebted to the testatrix in the sum of £300, for money lent by her to him at various times, together with interest thereon; that in December, 1818, it was agreed between them that the whole amount of the debt so due from the defendant to the testatrix should be ascertained, and the whole balance then due should thenceforth bear interest at £5 per cent. per annum, and that, in pursuance of such agreement, the defendant wrote and sent to her the letter of the 2nd December, 1818, and the statement of account annexed to it. That on the 21st June, 1819, and 27th August, 1819, the testatrix made to the defendant further advances of £20 each, for which he gave her the acknowledgments dated on those days respectively; that it was at the time agreed between them, that these two sums of £20 should also bear interest at £5 per cent. per annum; and that, from the 25th December, 1819, interest at that rate on the whole debt of £340 should be paid by the defendant to the testatrix on the 24th June and 25th December in each year; and that in pursuance thereof the sum of 8*l.* 10*s.* was duly and regularly paid to the testatrix, half-yearly, down to Midsummer 1831, by a Mr. Laxon, a surgeon at Coventry, as the agent and by the desire and on the behalf of the defendant, the last payment being made on the 8th July, 1831. That, on or shortly after the 25th December, 1825,

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the defendant sent to the testatrix a form of receipt which she was to give for the interest then due, and thereafter to accrue due, as follows:—"£8 10s. Received of Mr. Wm. Laxon the sum of 8*l*. 10s., being half a year's interest due to me from Mr. Thomas Wedgwood Walton. Dec. 25, 1825. Elizabeth Craven;"—which form of receipt the testatrix afterwards gave to Mr. Laxon until 1831. That, on the 24th December, 1831, the defendant remitted to the testatrix the sum of 8*l*. 10s. in cash, as the half-year's interest on the £340, due 25th December, 1831, inclosed in the note set forth ante, p. 620. The bill then alleged that the defendant, with the view of preventing the representatives of Miss Craven from enforcing payment of the debt after her death, (knowing that she would not call it in during her life, if the interest were regularly paid), determined to make all future payments of interest to the testatrix by himself in person, and without the presence of any witness, and always in coin or bank-notes, which he did accordingly, down to the month of January 1843; which payments were regularly entered in books of account kept by the testatrix, who died on the 19th June, 1843, without ever having received payment of the £340, which still remained unpaid, together with all the subsequent interest. The bill further alleged, that the plaintiff had discovered that the defendant had in his possession an acknowledgment in writing of the said debt of £340, signed by him, which was intended to have been sent to the testatrix, if she had required it, on which were indorsed by the defendant the several payments made by him for interest subsequently to the 1st January, 1838, and which the plaintiff had in vain applied to the defendant to deliver up to him. The bill then prayed a discovery and account.

The defendant, by his answer, stated that the testatrix (who was the sister-in-law of a gentleman to whom the defendant had been apprenticed) had from time to time offered and persuaded him to accept donations of sums of money,

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as testimonies of her regard for him, which were given to him as actual gifts, and without any understanding or expectation that they were ever to be repaid; and that in the year 1819 the defendant, feeling that she had lessened her income by withdrawing from investments the monies she had so given to him, arranged with her that he should, during her life, save her harmless as to any diminution of income, by paying her annually, by half-yearly payments, in the shape of an annuity, and not as payments of interest, the amount which she would have received for interest in case the full amount of such gifts had been laid out at £5 per cent.; that she acquiesced in such arrangement; and that, in accordance therewith, the defendant ascertained the amount of the said gifts to be £340, and accordingly paid to the testatrix the sum of £17, by half-yearly payments of 8*l.* 10*s.* each, down to her death, first through the hands of Mr. Laxon, and afterwards, from 1831, by letter or parcel. The answer then denied the existence of any acknowledgment in writing for the alleged debt of £340. In a schedule to the answer were set forth the receipts given half-yearly by the testatrix to Mr. Laxon, from January, 1823, to June, 1828.

The Lord Chief Baron, in summing up, told the jury, in substance, that the defendant's answer was a sufficient acknowledgment, within Lord Tenterden's Act, 9 Geo. 4, c. 14, to take the case out of the Statute of Limitations, if the rest of the evidence satisfied them that the payments made by the defendant were in the nature of *interest upon a loan* of money to him, and that the money was not a gift; and the jury found a verdict for the plaintiff, damages £340, leave being reserved to the defendant to move to enter a nonsuit, if the Court of Exchequer should be of opinion that there was no sufficient acknowledgment to take the case out of the statute; and also to the plaintiff to move to increase the damages by the amount of the interest accrued due since the death of the testatrix. Rules nisi for these

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purposes were subsequently obtained; upon the discussion of which, it was arranged that judgment should be signed for the defendant; that the plaintiff should be at liberty to tender a bill of exceptions upon the evidence adduced by him, and upon such summing up, as should raise the question under the plea of the Statute of Limitations, as if done at the trial; and that, if the Court of Error should award a venire de novo, judgment should be entered for the plaintiff, with 364*l.* 13*s.* 8*d.* damages, and costs; and a rule was drawn up accordingly.

A bill of exceptions was thereupon drawn, and sealed by the Lord Chief Baron, stating, as the ground of exception, that his Lordship had directed the jury that the evidence adduced by the plaintiff was not legal or sufficient evidence to entitle him to a verdict on the issue joined on the plea of non assumpsit, so far as it related to the last four counts of the declaration, nor on the issue joined on the plea of the Statute of Limitations; and a writ of error was sued out thereon by the plaintiff, which was argued in this Court (a) in Hilary Vacation, 1847.

The plaintiff's points for argument were as follows:—First, that the jury were entitled, if they thought fit, to believe one part of the answer of the defendant, and to disbelieve the other.

Secondly, that they might, therefore, believe that he periodically transmitted, as stated in his answer, the sums mentioned in that behalf, but might not believe that any gift had been made by the testatrix to him.

Thirdly, that, from the fact of the periodical transmission of such sums, joined with evidence independent of the answer, the jury might, if they thought fit, infer that the said sums were paid as interest in respect of a loan.

Fourthly, that, if they so inferred, they might infer a promise made within six years of the bringing of the action.

(a) February 7, before *Wilde, C. J., Patteson, J., Coleridge, J., Maule, J., Wightman, J., Cresswell, J., Erle, J., and Williams, J.*

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On these grounds, the plaintiff in error contends, that he is entitled to reverse the judgment below, consistently with the doctrine that an admission of payment of interest, to defeat the Statute of Limitations, must be made in writing, signed by the party making the admission. But

Fifthly, the plaintiff in error will contend, if necessary, that such a doctrine cannot be supported.

The defendant's points were:—That there was not sufficient evidence to be left to the jury in support of the affirmative of the first issue, so far as it related to the last four counts of the declaration, or of the second issue; and that the opinion and direction of the learned Chief Baron were correct. That any acknowledgment to take a case out of the Statute of Limitations must be in writing, signed by the party making it. That such acknowledgment must be construed by the Court and not by a jury; and must either contain an express promise to pay the debt sought to be recovered, or be an acknowledgment from which the Court can imply such a promise. That no such promise can be implied from the acknowledgment contained in the defendant's answer. That no promise can be implied from the compulsory acknowledgment contained in an answer in Chancery.

Ellis, for the plaintiff in error.—It is not sought, in the present case, to extract from the answer in Chancery an acknowledgment of *the debt*. Nay, it is not even sought to extract from it an acknowledgment of an antecedent *payment* of interest upon the debt; for, strictly speaking, the payment of interest is not acknowledged therein, but denied. The plaintiff seeks only to obtain from the answer the admitted fact of the periodical transmission by the defendant to the testatrix of sums amounting to 5*l.* per cent. per annum on the alleged debt. The case of *Willis v. Newham* (a), therefore, on which reliance will be placed for the defend-

ant, is inapplicable. That case decided, that part payment of principal or payment of interest, if proved by the admission of the debtor, must be by an acknowledgment in writing, and signed by him. But this is not an acknowledgment of payment, and therefore not within the subject-matter of that decision: if it were, it would satisfy that decision, for it *is* in writing, and signed by the defendant. If, in this case, the plaintiff had no evidence but the answer, he would no doubt fail, according to all the cases: see *Owen v. Wolley* (b), and the other authorities cited in the notes to 1 Wms. Saund. 64 g. But he first proves an actual debt by the other evidence, if the jury think fit so to interpret the facts, as in this case they did. Then the answer supplies the further fact, that the defendant periodically transmitted the same sum down to Christmas, 1842. It is true, the defendant adds, that this was not properly a debt, or payment of interest in respect of one, but in fact a life annuity. But the jury were not bound to believe the whole of the statement, and might reject that part: 1 Phill. Evid. 362; 1 Stark. Evid. 335. If they believe the fact of the transmission of the money, but disbelieve the assertion as to its character, it is as if the document had contained the former statement only. Suppose, in February 1844, the defendant had written a letter to the intestate, stating that he had sent her 8*l.* 10*s.* every half-year down to Christmas, 1842; might you not couple that with other evidence to shew the character of that act? This has really, therefore, nothing to do with the question whether an acknowledgment of payment of the debt must be in writing; and the present case is entirely consistent with the decision in *Willis v. Newham*. If this *be* an acknowledgment, the rule of law there laid down is satisfied; if it *be not*, that case is inapplicable. In truth, the defendant says it is no acknowledgment, because an admission of payment in

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(a) Bull. N. P. 149.

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the character of interest cannot be extracted from the instrument. The fact is, the *payment* is the acknowledgment of the debt, not the admission of that payment. It is an admission of an acknowledgment; and therefore it is that it is as well proved by a stranger as by the defendant's own statement; whereas an acknowledgment, as such, derives its essence from its coming from the defendant. In *Waters v. Tompkins (a)*, there was no writing at all. There the payment of interest was proved by independent evidence, and the appropriation of it by the admission of the debtor; and this was held sufficient. That, therefore, was the direct converse of the present case. The principle of that case is confirmed in *Edan v. Dudfield (b)*, and in *Bevan v. Getting (c)*. In *Bayley v. Ashton (d)*, on the other hand, *all* was in writing, but the acknowledgment of payment was held insufficient, within the authority of *Willis v. Newham*, because not *signed* by the defendant. But all these cases warrant the division of the proof of payment into its two elements,—the transmission and the appropriation,—either of which may be proved by the admission of the debtor, if the other be proved by independent evidence.

But, secondly, the decision in *Willis v. Newham* cannot be supported. The proviso in the 9 Geo. 4, c. 14, s. 1, is express, that “nothing therein contained shall take away or lessen the *effect* of any payment of any principal or interest made by any person whatsoever.” And even if that proviso has the narrow operation attributed to it in *Willis v. Newham*, the case is not within the enacting part of the section, for it is not an “acknowledgment or promise *by words only*.” Again, the *mischief* contemplated by the statute was, that an acknowledgment of the existence of the debt might easily be misconstrued or perverted. But

(a) 2 C., M., & R. 723.

(c) 3 Q. B. 740.

(b) 1 Q. B. 307; 4 P. & D.

(d) 12 Ad. & E. 493; 4 P. &

the mere admission of the naked fact of payment—i. e. of the handing over of money—is very little, if at all, liable to such a danger. The only means of possible mischief, in respect to it, is by giving oral evidence of the *purpose* for which it is handed over;—but this the cases say *may* be done. *Haydon v. Williams* (a) shews that you may give secondary evidence of a *lost* written acknowledgment. Why should it not equally satisfy the statute, if the defendant admitted it, though not lost, in order to save expense? In *Eastwood v. Saville* (b), and in *Maghee v. O'Neill* (c), the Court of Exchequer plainly intimated their dissatisfaction with the decision in *Willis v. Newham*; as did also Lord Denman in *Bayley v. Ashton*.

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Peacock, contra.—It is contended on the other side, that the defendant's answer is admissible in the same manner as any other admission the defendant might have made, to prove the fact of payment of interest; and that the jury were at liberty to believe a part and reject the rest, as in the case of any other acknowledgment. But the defendant contends, that when a document is tendered as an acknowledgment under this act, to take the debt out of the Statute of Limitations, no part of it can be rejected; and that if it is to be considered as an acknowledgment in writing, the construction of it is for the Court, and not for the jury; *Morrell v. Frith* (d), *Burchell v. Church* (e); and if on the face of it the Court cannot infer a promise to pay, it is not sufficient for that purpose. The words of the statute are, that "no acknowledgment or promise by words only" shall be deemed sufficient evidence to avoid the Statute of Limitations, unless such acknowledgment or promise "shall be in writing, and signed by the party

(a) 7 Bing. 163; 4 M. & P. 811. (d) 3 M. & W. 402.

(b) 9 M. & W. 615.

(e) 9 C. & P. 209.

(c) 7 M. & W. 531.

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chargeable thereby: provided, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest by any person whatsoever." Now the effect of payment of interest is very different from the effect of a written acknowledgment; for the latter binds only the party making it, whereas payment of interest binds a co-contractor also, though made without his concurrence, as in fraud of him: *Burleigh v. Stott* (a), *Wyatt v. Hodson* (b). In *Willis v. Newham, Garrow, B.*, refers to the case of an account current, in which the party charges himself, and takes credit for payments made by him. He says—"It was said, shall not this be evidence he took the case out of the Statute of Limitations? I answer, no, because the act says the defendant shall not be charged except by *an acknowledgment in writing, signed by him.*" As that learned judge there says, the proviso is only that nothing therein contained shall lessen the effect of any payment, if properly proved, that is, by evidence of the actual payment, or by a writing such as the act requires; and being so proved, it shall have the same effect as it had before the passing of the act: *Clarke v. Alexander* (c). Suppose one partner admitted, in the presence of a witness, that the firm had paid interest on a debt; is that enough to satisfy the statute as against all the co-partners? A direct acknowledgment in writing of the debt by the one partner would not; yet, according to the argument on the other side, a mere admission of payment, from which the Court are to imply a promise, is to do so. Again, the mere fact of payment may or may not enable the Court to imply such a promise; it must be a payment of interest as interest, on a debt which is then due: *Tippetts v. Heane* (d). Suppose, when the defendant made the payment in De-

(a) 8 B. & C. 36.

(c) 13 Law J., C. P., 133.

(b) 8 Bing. 209; 1 M. & Scott,

(d) 1 C., M., & R., 252.

cember 1842, he had denied the existence of the debt; would that have been sufficient? An actual payment on account of a partnership debt revives the debt against all the partners, though made fraudulently, and in concert with the creditor; *Goddard v. Ingram* (a); is the same effect to be given to the mere admission of a payment? Surely a parol admission of a written acknowledgment could not be used to satisfy the statute; it would at once let in all the mischief which it was intended to prevent. Again, suppose the debtor admitted he had paid, but denied at the same time that any debt was due; is such an admission to be effectual against him? The statute says, that "no acknowledgment by words only" shall be deemed sufficient evidence to defeat the Statute of Limitations; that is, no acknowledgment of anything by words only. Here, however, there is nothing by parol; there is no evidence whatever of payment within the six years, but the answer in Chancery; and the construction of that is for the Court, who are to look at the whole instrument, and draw their conclusion from the whole. Now the defendant, though he admits a payment of money, says at the same time that he paid it as an annuity, and *not* as a payment of interest. How can that be taken or used as an acknowledgment of a payment by way of interest? The decision in *Willis v. Newham* was after much deliberation; it was in accordance with the opinion of *Bayley, J.*, who tried the cause, and the Court will not lightly depart from it.

Ellis, in reply.—The argument on the other side has throughout confounded that which is given as an acknowledgment of the debt, with that which is given merely as evidence of one fact which tends to prove an acknowledgment of the debt by payment. No doubt, where a written instrument contains an acknowledgment of the debt, it is to

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(a) 3 Q. B. 839; 3 G. & D. 46.

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be construed by the Court, and taken altogether; but this answer is not used for that purpose.

Cur. adv. vult.

The judgment of the Court was now delivered by

WILDE, C. J.—This was an action brought by Francis Baildon, as executor of Elizabeth Craven, against Thomas Wedgwood Walton, for money lent by the testatrix to the defendant, for interest, and money due on an account stated with the testatrix, laying the promise to pay to the testatrix. There was a similar set of counts on promises to the executor, and a count on an account stated with the executor. The defendant pleaded non assumpsit, and that the causes of action did not accrue within six years.

The case was tried before the Lord Chief Baron, at the sittings in Middlesex, after Michaelmas Term, 1844, when a bill of exceptions was tendered to the direction of the learned Judge, which bill stated that the counsel for the plaintiff gave legal and sufficient evidence in support of the affirmative of the issue first joined, so far as the same relates to the first three counts. It then proceeds to state certain letters and other documents written by the defendant, and sent by him to the testatrix. [His Lordship stated them, as ante, p. 618.] The bill of exceptions then sets out a bill in equity, exhibited by the plaintiff against the defendant, and his answer. The bill charged, that the defendant borrowed of Elizabeth Craven, at different times, money amounting in the whole to £340, and that he paid interest for it at the rate of £5 per cent. per annum, by half-yearly payments, down to the 25th of December, 1842, and that Elizabeth Craven died on the 19th of June, 1843. The defendant, by his answer, denied that he had ever borrowed any money of Elizabeth Craven, but stated that she had at different times made him presents of money, amounting in the whole to £340, and that he had paid to her half-yearly £5 per cent. on that sum, not

as interest, but as an annuity, in consideration of her having given him the money; and that the last of such payments was made on the 25th of December, 1842. It was insisted for the plaintiff, that this evidence was sufficient to entitle the jury (if they should think fit) to find a verdict for the plaintiff on the first issue, as far as it related to the last four counts, and on the issue secondly joined. The learned Judge ruled that it was not sufficient for that purpose, and directed the jury, as to the last four counts, and as to the issue on the Statute of Limitations, to find a verdict for the defendant, whereupon a bill of exceptions was tendered.

The case was argued after last Hilary Term, by Mr. *T. F. Ellis* for the plaintiff in error, who contended that there was sufficient evidence (as stated in the bill of exceptions) of an original debt from the defendant to the testatrix, and of payment of 8*l.* 10*s.* half-yearly, for interest, down to a certain period, and that the only fact to be supplied was the continuance of such payments within six years; that the defendant's answer in writing, and signed by him, admitted the payment of 8*l.* 10*s.* half-yearly, down to the 25th of December, 1842; and although in that answer he added that the payments were not made for interest on a debt, and that no debt ever existed, the jury were at liberty to reject the latter part, and find from the other evidence that the payments were made for interest on a debt.

On the other hand, it was contended by Mr. *Peacock* for the defendant in error, that the jury could not reject any part of the statement in the answer, for that the statute 9 Geo. 4, c. 14, says that "no acknowledgment by words only shall be deemed sufficient evidence of a new or continuing contract, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby," and which words apply as well to an acknowledgment of a payment as to an acknowledgment of a debt, and therefore, as the acknowledgment

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must be in writing, nothing could be added to it by parol, and the Court must construe it altogether, as written by the defendant, and, if so construed, the answer did not admit a payment in discharge of interest on a debt, but expressly denied it.

In the course of the argument, many observations were made on the one side and the other upon the case of *Willis v. Newham*(a), in which it was held that a verbal acknowledgment of part payment of a debt within six years would not, after 9 Geo. 4, c. 14, be an answer to a plea of the Statute of Limitations; but it seems to us quite unnecessary to express any opinion on that point: in reality there is no question here upon the 9 Geo. 4, c. 14. The defendant has made no admission by words only, not contained in a writing signed by him; whatever admission he has made was made in writing, signed and sworn to by him, and the true question is, what did he admit by that writing? For the purpose of this argument, it may be assumed, that the acknowledgment of a payment, as well as any other acknowledgement, must be in writing, signed by the party; and we agree with Mr. Peacock, that the written admission by the defendant must be construed by the Court; and we think that the plain meaning of it is, that the defendant admits having paid 8*l.* 10*s.*, half-yearly, to Elizabeth Craven down to December, 1842, but asserts that such payment was made by way of annuity, and not as interest on a debt. We also agree with Mr. Peacock, that the whole admission must be laid before the jury as one entire writing,—but we are also of opinion that the jury were not bound to believe the whole of it; they might believe the fact of 8*l.* 10*s.* being paid half-yearly, but reject the residue, and infer from the other evidence in the case that the payments were made for interest upon a debt. If the admission had been merely that the defendant had paid the sum of 8*l.* 10*s.* half-yearly, without adding that it was appropriated to any particular ac-

(a) 3 Y. & J. 518.

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count, there can be no doubt that the jury might have inferred from the evidence that a debt existed, and that interest was paid down to a certain period, that the subsequent payments *admitted* to have been made were also for interest. In *Waters v. Tompkins* (a), it was held, that where the fact of payment of a sum of money is proved, the appropriation of it may be shewn by other evidence, even by a verbal statement. Here the fact of payment was proved by an admission in writing, and of the appropriation there was sufficient evidence to be left to the jury. The only question is, whether the assertion of the defendant respecting the appropriation was conclusive. If the payments had been accompanied by that assertion, they would have been qualified by it, and could not have been treated as payments of interest on a debt; but here there is an admission of a by-gone act, viz. payment, and an assertion respecting it, which may or may not be true. It is no part of the act, but only what the defendant chooses to say respecting it. We think, therefore, that although that assertion must be admitted as evidence, the jury ought to have been allowed to contrast it with the other evidence in the case, and to decide whether the payments admitted were for interest or not; and inasmuch as that other evidence was withdrawn from their consideration, and they were directed to find for the defendant, there must be a *venire de novo*.

Venire de novo.

(a) 2 Cr., M., & R. 723.

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If A. covenant with B. & C., their executors, administrators, and assigns, although C. do not execute the deed or assent to the covenant, and afterwards disclaim it by deed, to which A. is no party, B. cannot alone (living C.) sue A. upon the covenant.

COVENANT.—The declaration set forth an indenture, dated 30th December, 1842, made between John Mynde Cooke, and Eliza his wife, of the first part; the plaintiff in error (the defendant below), of the second part; and the defendant in error (the plaintiff below), and Lord Glenelg, of the third part; whereby it was witnessed, that, for the considerations therein mentioned, the defendant below, for himself, his heirs, executors, and administrators, covenanted with the plaintiff below and Lord Glenelg, their executors, administrators, and assigns, to pay to them a certain sum of money, in certain instalments, upon certain trusts therein mentioned. It then set forth another indenture, dated 9th December, 1843, between the said John Mynde Cooke of the first part, the plaintiff below of the second part, and John Evans of the third part, by which the said John Evans was substituted as a trustee of the former settlement, in the place of the plaintiff below. The declaration then proceeded to allege, that Lord Glenelg never assented to or ratified the said first-mentioned indenture; and that, on the 28th March, 1844, by an indenture then made between Lord Glenelg of the one part, and the said John Evans of the other part, Lord Glenelg disclaimed all the trusts of the said first-mentioned indenture, and that the defendant below had notice of such disclaimer. The declaration stated a breach by the defendant below of the covenant contained in the first-mentioned indenture, by the nonpayment of certain instalments due before the commencement of the suit.

To this declaration, the defendant below demurred specially, assigning for cause, that it did not disclose any right in the plaintiff below to maintain a separate action for breach of the covenant declared on; but that Lord Glenelg ought to have been joined in the action as a co-plaintiff. The defendant below joined in demurrer, and the Court of

Exchequer gave judgment thereon (without argument) for the plaintiff below. A writ of error was brought upon that judgment, which was argued in this Court on the 28th of November, 1846 (a).

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Watson, for the plaintiff in error.—The question in this case, which appears to be one of the first impression, is this: whether, the plaintiff below and Lord Glenelg being joint covenantees under the deed of 1842, the plaintiff can, during their joint lives, under the circumstances set forth in the declaration, maintain this action of covenant alone, without joining his co-covenantee. It is submitted that he cannot. It is a clear proposition of law, that where a joint covenant is made to two persons, one of them cannot, living the other, sue upon it alone. Here the covenant is clearly a joint one. What then is the effect of Lord Glenelg's non-assent to the covenant and subsequent disclaimer by deed? The fact still remains that the defendant covenants with the two, reposes confidence in both, and is under the obligation to perform his contract with both. It cannot be a contract with two, or with one if the other dissents. The plaintiff in this case is in truth attempting to introduce into the law a new exception, never before recognised. Lord Glenelg may still, notwithstanding all that has been done, assent to and adopt the covenant. Nothing has taken place which is binding upon him, as between him and the defendant. Why may he not still come in and sue? It may be said, that, if this action cannot be maintained by the plaintiff Langston alone, no action at law at all can be brought, because Lord Glenelg will refuse his name. But if he does so, equity will interpose. The same argument would apply to a release by one of two joint covenantees. There is no instance in the books of an action by one of two joint covenantees, living the other. That both *may* sue jointly,

(a) Before *Wilde*, C. J., *Patteson*, J., *Coleridge*, J., *Coltman*, J., *Maule*, J., *Wightman*, J., *Erle*, J., and *Williams*, J.

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although one of them did not seal the deed, is clear from the authorities: *Clement v. Henley*, Roll. Abr., "Faits," (F. 2); *Vernon v. Jeffreys* (a). And in *Petrie v. Bury* (b), it was held that all *must* sue jointly, although all did not seal the deed. It is true the effect of an express refusal to assent to the covenant or disclaimer did not arise in that case. *Abbott*, C. J., there says: "We are not called upon to consider the effect of an express disclaimer, renunciation, or refusal by the other covenantees, for nothing of that kind is alleged. Trustees very often assent to a trust without executing the deed which creates it, and they may assent at any time, and without an express allegation of dissent that will not appear." *Bayley*, J., says: "By the deed in question, James Bury covenanted that his heirs or executors should pay the annuity to three persons. It appears on the face of the deed to have been his intention that the money should go into the hands of the three, and that there should be the security of them all for the due application of the money. It is a general rule, confirmed by the late case of *Scott v. Goodwin* (c), that all joint covenantees or obligees must sue. In this case, therefore, the plaintiff was wrong in suing alone, without shewing some special title to do so. The defendants have a right to say, the contract was never made with you alone, but with you together with two others." And *Holroyd*, J., says: "The plaintiff is not entitled to sue alone on this covenant; it was made with three persons, and although two of them did not seal the deed, yet it is not in law converted into a covenant with one. No intention that it should be so is shewn, and by law the covenant does not import that." That is the only case in which any discussion took place on this subject; there are however some in which the point is referred to, as in *Foley v. Addenbrooke* (d). This may perhaps be likened to the case of a disclaimer of an *estate*;

(a) Stra. 1146; 7 Mod. 358. (c) 1 Bos. & P. 67.

(b) 3 B. & C. 353; 5 D. & R. 152. (d) 4 Q. B. 197; 3 Gale & D. 64.

but it is wholly dissimilar. No doubt a man may dissent from receiving an estate by devise or conveyance: it may be prejudicial and burthensome to him, as being encumbered with services or rent. The doctrine on this subject is to be found in *Shep. Touchst.* 285; in *Butler and Baker's Case* (a), and in *Townson v. Tickell* (b). But the case is very different with respect to a contract; and it is very difficult to see how one of the parties to it can disclaim it, without defeating the contract altogether. This is in law a contract with the two covenantees, and it was not in the power of one of them, by his own act only, to make it a contract with the other covenantee only.

Another question arises as to the effect of the deed of disclaimer. There is nothing in that deed to prevent Lord Glenelg from again assenting to the covenant for the purpose of suit. It is not a deed between him and the plaintiff in error, but is merely made to the new trustee, Evans. Suppose judgment were entered up on the warrant of attorney, surely it must be in the names of both.

Pashley, contra.—It is argued on the other side, that notwithstanding his non-assent to the covenant, and his disclaimer of it by deed, there is no reason in law why Lord Glenelg may not yet come in and sue; but that is not so, for the facts stated in the declaration operate as an estoppel upon him, and would conclusively prevent his ever so proceeding. The case would fall within the doctrine of estoppels in pais, as stated in *Co. Litt.* 352. a. That subject was much considered in the case of *Lyon v. Reed* (c); in which *Parke*, B., says (d), "The acts in pais which bind parties by way of estoppel, are but few, and are pointed out by Lord Coke, *Co. Litt.* 352. a. They are all acts which anciently really were, and in contemplation of law have always

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(a) 3 Rep. 26.

ante, 517.

(b) 3 B. & Ald. 31; see also
the note in 4 Man. & Ry. 191;
and *Doe d. Chidgey v. Harris*,

(c) 13 M. & W. 285.

(d) Page 309.

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continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like." Here there is the solemnity of a deed, the object of which was to furnish conclusive evidence to all future time of the fact of non-assent to the covenant, and so to create an estoppel. [*Coleridge, J.*—It is a deed between Lord Glenelg and a third party only.] Taking it merely as a deed-poll, it operates as an estoppel. In *Whelpdale's case* (a) it is said, "If a bond be delivered to another, to the use of the obligee, and it is tendered to him, and he refuses it, now the delivery has lost its force, and the obligee *can never after agree to it*; and therefore the obligor may say it is not his deed. So, if a bond be made to a feme covert, and the husband disagrees to it, the obligor may plead non est factum; for by the refusal the bond lost its force, and became no deed." It may be admitted the cases establish that all covenantees must join in suing upon the covenant, although they have not sealed the deed, if nothing more appears to excuse the non-joinder. This subject was much considered in the case of *Cooch v. Goodman* (b). But here there is what was wanting in the case of *Petrie v. Bury*, and upon the absence of which the judgment in that case was founded, an express refusal to assent, and a disclaimer by deed. This case, no doubt, is distinguishable from that of the disclaimer of an estate, but the distinction is in favour of the defendant in error. It surely must be much easier to refuse a *contract* than an *estate*, which actually vests an interest by the deed or will. How can there be a contract with a dissenting party? There must be the concurrence to it of the minds of both contracting parties. The doctrine laid down in *Shep. Touchst.* 285, is strongly in favour of the defendant in error. It is there said, "No estate can be made to a man of anything in fee-simple, for life or otherwise, against his will; and therefore, by his disagreement or refusal of it, the estate itself,

(a) 5 Rep. 119 b. (b) 2 Q. B. 580; 2 Gale & D. 159.

and the deed whereby it is conveyed, may become void." And Mr. Preston adds,—“ But if a feoffment is made to two as joint-tenants, and one only disagree, the entirety will vest in the other.” And again,—“ The law presumes that every grant &c. is for the benefit of the grantee, &c.; and therefore, till the contrary is shewn, supposes an agreement to the grant. From the moment there is evidence of disagreement, then, in construction of law, the grant is void ab initio, as if no grant had been made (a).” The question as to the nature of a disclaimer which shall be sufficient in the case of an estate, is, however, settled in the case of *Begbie v. Crook* (b), following the decision in *Townson v. Tickell* (c). In *Bonifaut v. Greenfield* (d) it seems to have been thought, that, at common law, when any one of several devisees in trust refused to interfere, the others might sue alone: see also Bro. Ab., “Devise,” pl. 31. In *Townson v. Tickell* (e) *Holroyd, J.*, citing *Bonifaut v. Greenfield*, says, that “The law presumes that he [the devisee] will assent until the contrary be proved; when the contrary, however, is proved, it shews that he never did assent to the devise, and consequently that *the estate never was in him.*” No doubt, this is a contract with the two trustees; but the question is, what are the *legal incidents* of that contract, and whether, being void as to one by relation back of his non-assent, it is not good as to the other? Suppose a covenant with the plaintiff and an alien enemy—would it not be good as to the plaintiff? So, “if I be bound in an obligation to a monk and J. S., this deed is void as to the monk, because he is civiliter mortuus, but good as to J. S.,” Shep. Touchst. 71. [*Wilde, C. J.*, referred also to Vin. Abr., “Grants,” (A. 5).] Many authorities appear to estab-

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(a) The learned counsel referred also to the notes of Mr. Sergeant *Manning* on this subject, in 4 Man. & Ry. 191; 2 Man. & G. 701; 3 Man. & G. 733; 6 Man. & G. 456; and 1 C. B. 381.

(b) 2 Bing. N. C. 70; 2 Scott, 128.

(c) 3 B. & Ald. 31.

(d) Cro. Eliz. 80; 1 Leon. 60; Godb. pl. 92.

(e) 3 B. & Ald. 31.

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lish, that, by a disclaimer or declaration of non-assent on the part of one trustee, the estate vests wholly in the others: *Smith v. Wheeler* (a), *Nicloson v. Wordsworth* (b), *Cooke v. Crawford* (c), *Small v. Marwood* (d). So it seems, that, by the dissent of a covenantee, the only effect is that there is no covenant *with him*: *Waferer v. Rowe* (e). So also, if there be a demise by deed, by two persons, and one disagree to it, it is the lease of the other only: *Thetford v. Thetford* (f), *Anon*, 4 Leon. 207. In *Butler and Baker's case*, again, it is said (g), "If a man makes a gift in tail to husband and wife, and afterwards grants the reversion of the lands and tenements which the husband and wife hold in tail, and afterwards the husband dies, and the wife, to have her dower, waves and disagrees to the estate tail; now as to her there is a nullity of the estate ab initio, and to such intent the law feigns that the estate was made only to the husband." There would be great inconvenience, in a case where there were many trustees or covenantees, as in a marriage settlement, if the trust or covenant were defeated altogether by the refusal of one of them to accept the trust or act. The case of *Petrie v. Bury* only shews that one of several covenantees cannot sue alone, without shewing some title to do so. It is clear that this covenant is not one upon which at all events both covenantees must sue; because, in the event of the plaintiff below *surviving* Lord Glenelg, the joint nature of the covenant would not prevent his suing upon it alone: And here the plaintiff just as fully accounts for and excuses the nonjoinder of the other covenantee, as if he were no longer living. This subject is discussed in the notes to 1 Wms. Saund. 291 i.

Watson, in reply.—The argument on the other side in effect amounts to this, that, by the disagreement of one co-

(a) 1 Ventr. 128; 2 Keb. 772.

(b) 2 Swanst. 365.

(c) 13 Sim. 91.

(d) 9 B. & C. 300.

(e) Cit. Moor, 300.

(f) 1 Leon. 192; Anderson, 221.

(g) 3 Rep. 28 b.

venantee, a new contract arises with the other alone; and that argument would equally apply to all contracts of every kind, as on bills of exchange or promissory notes, so that whenever one payee dissented, the other might sue alone. No assent is here shewn by the defendant below to this being treated as a covenant with the plaintiff Langston alone. Many of the cases cited on the other side are strongly in favour of the plaintiff in error, as shewing that by the disclaimer the obligation is void altogether. It is clear that by the *release* of one of the joint contracting parties the contract is entirely gone. *Waferer v. Rowe* is an authority to show, that where a single covenantee dissents, the deed is void; and it is submitted that the same rule is applicable to the case of several joint covenantees. The case of the monk or alien enemy has no application, because such a person is looked upon by the law as a person having no existence. As to the supposed *estoppel*, that cannot be, because there is no mutuality. With respect to the case of *Lyon v. Reed*, the Court never meant to say in that case that the execution of a deed could operate as an estoppel as against strangers to it. The effect of the case of *Petrie v. Bury* is, that a trustee who has not executed the deed may nevertheless come in at any time; so he may also notwithstanding a former non-assent. If Lord Glenelg and the plaintiff Langston had jointly sued the defendant below, he could not have pleaded the non-assent of Lord Glenelg. In the case of *survivorship*, the right of suit is transferred by operation of law to the survivor, not by any act of the parties.

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Cur. adv. vult.

The judgment of the Court was now delivered by

WILDE, C.J.—This case arises on a writ of error upon a judgment given for the plaintiff below in the Court of Exchequer, in an action of covenant. The declaration states an indenture of settlement of the 30th December,

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1842, purporting to be made between John Mynde Cooke, and Eliza his wife of the first part, the defendant of the second part, and the plaintiff and Lord Glenelg, of the third part, by which it was witnessed, that the defendant covenanted with the plaintiff and Lord Glenelg, their executors, administrators, and assigns, to pay them a certain sum of money in certain instalments, upon trusts mentioned in that indenture. The declaration then states an indenture of 9th December, 1843, between John Mynde Cooke of the first part, the plaintiff of the second part, and one John Evans of the third part, and purporting to substitute John Evans as trustee of the former settlement, in the place of the plaintiff. The declaration goes on to aver, that Lord Glenelg never assented to or ratified the first-mentioned indenture, and that, on the 28th March, 1844, by an indenture made between Lord Glenelg of the first part, and the said John Evans of the second part, the said Lord Glenelg disclaimed all the trusts of the first-mentioned indenture, and that the defendant had notice of such indenture of disclaimer. The declaration then states a breach of the covenant to pay certain instalments. To this declaration the defendant demurred, and the Court of Exchequer gave judgment for the plaintiff.

The question raised by this record is, whether the declaration shews a right in the plaintiff to maintain a separate action against the defendant. Much of the argument in this Court applied to a different question, that is to say, whether a joint action could have been maintained by the plaintiff and the other covenantee, Lord Glenelg. But as the question, whether the separate action can be maintained, may, as it appears to us, be decided upon principles immediately applicable to it, without any intermediate inquiry as to the right to maintain a joint action, we do not think it material to inquire whether such joint action could be maintained.

No doubt or difficulty arises in the present case as to the construction of the covenant; it is in terms a joint and not

a several covenant, and there is nothing in the subject to which it applies, in the interest of the covenantees, or in the context of the indenture, to require or admit a different construction. It was not disputed on the argument that the covenant was of this description; the right to maintain a separate action not being contended, on the part of the plaintiff, to arise upon any construction of the terms of the covenant itself, but out of the transaction which afterwards took place, as stated in the declaration (the material part of which is the disclaimer of Lord Glenelg), but for which transaction it was properly admitted that the present action could not be maintained. The question, therefore, is, whether that disclaimer has the effect of enabling the plaintiff to sue alone. And this question may be decided upon two very general and well established rules of law:—First, that, in order to make a binding contract, the assent of both parties is necessary; the other, that a right to sue upon a contract is not assignable by the act of the party who has such right. This latter rule is subject to exceptions in cases of certain mercantile contracts, and of contracts relating to land, which are not applicable to the present case. To apply the first of these rules to the present case:—The only contract to which the assent of the defendant is shewn, is that contained in the settlement of December, 1842; the execution of that indenture is the only act of the defendant from which any assent of his can be inferred; from that time he is merely passive; he is no party to the subsequent transaction between Lord Glenelg and Evans, which therefore, whatever other effect it may have, cannot operate as an assent by him to any contract. It is true, indeed, that a contract may arise upon an instrument under seal, between a party who does not execute it, and one who does; as where the covenantor executes, but the covenantee, or one of several covenantees, does not; but in that case, the covenantee who has not executed, by bringing the action, gives his consent to the contract, and the covenantor having consented by executing the deed, there is the consent of both

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parties. But though a consent to a contract is implied by being a *plaintiff* in an action upon it, being a *defendant* certainly does not involve any such consent by him to any contract. That a contract by one person with two jointly does not comprehend or involve a contract with either of them separately, is evident from the well-known doctrine that a covenant or promise to two, if proved in an action brought by one of them, sustains a plea which denies the existence of the contract. The meaning of the words of the covenant in the present case is, that the defendant will pay the two covenantees; that meaning is the same whether they accept the covenant or not; and the acceptance of the one and the refusal of the other does not alter the sense, so as to convert it into a covenant to one only. In the case of *Petrie v. Bury (a)*, which was one of a joint covenant to three, of whom two did not seal the deed, *Holroyd, J.*, says, "The plaintiff is not entitled to sue alone on this covenant; it was made with three persons; and although two of them did not seal the deed, yet it is not to be converted into a covenant with one; no intention that it should be so is shewn, and by law the covenant does not import that. Supposing the two others had executed, the present plaintiff would not by himself be entitled to recover the whole or any part of the money, and there is nothing to shew an intention that he should have any such right, in the event of the neglect of the others to execute the deed." This reason applies distinctly to the present case, in which there is nothing to shew an intention, that, in the event of Lord Glenelg's refusal, the plaintiff should have the right of recovering the money alone. The present declaration, therefore, does not shew any covenant by the defendant with the plaintiff alone, inasmuch as it shews no consent by him to such a covenant, and, without his consent, the assent of the plaintiff and Lord Glenelg is inoperative to make a contract binding on him.

The liability, however, to be sued jointly by the two

(a) 3 B. & C. 353.

covenantees, to which the defendant did assent, might perhaps be sufficient to sustain the present action, if it were not for the rule secondly above referred to, which prohibits the assignment of the right to enforce such a liability, inasmuch as the indenture of disclaimer sufficiently shews an intention on the part of Lord Glenelg and the plaintiff, that the plaintiff shall have the right to sue, which, before the execution of that deed, might have been exercised by the plaintiff and Lord Glenelg. But there is no doubt that such a right is by law not assignable. The defendant, indeed, does in terms covenant with the plaintiff and Lord Glenelg, their executors, administrators, *and assigns*; but the rule which prohibits the assignment of a right to sue on a covenant, is not one which can be dispensed with by the agreement of the parties, and it applies to covenants expressed to be with assigns as well as to others. It was observed, in the argument on the part of the plaintiff, that the covenant in question was not one on which *at all events* both parties must sue, for that in the event of the plaintiff surviving Lord Glenelg, the joint nature of the covenant would not prevent him from suing alone; and there is no doubt this is so. But in the case of survivorship, as in that of the transfer of the right to sue to the personal representatives of a sole or surviving covenantor, the right of action is transferred by operation of law, not by act of the party. There are many cases in which that may be done by the operation of law, which cannot be done by act of the party. It is laid down by Lord *Coke* (a), that "a man by his own act cannot alter the nature of his action; and therefore if the lessee for life or lessee for years do waste, now is an action of waste given to the lessor, wherein he shall recover two things, viz. the place wasted, and treble damages; in this case, if the lessor release all actions real, he shall not have an action of waste in the personalty only, and if he release all actions personal, he shall not have an action of waste in the realty only. And so if the lessee doth waste, and

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after surrender to the lessor his estate, and the lessor accept thereof, the lessor shall not have an action of waste. But by act in law the action may be changed; as if a man make a lease pur terme d'autre vie, and the lessor doth waste, and then cestui que vie dieth, an action of waste shall lie for damages only, because the other is determined by act in law."

There were also some authorities cited in the argument on the part of the plaintiff, which, it was contended, shewed that by the disclaimer of Lord Glenelg the plaintiff became solely entitled to the right of action, which, but for that disclaimer, would have belonged to him jointly with Lord Glenelg. They were cases in which a devise or conveyance to two persons jointly, one of whom disclaimed, has been held to vest the whole estate in the other. But the analogy of those cases is inapplicable, because the subject dealt with was not a mere personal contract, but an interest in land. Now, joint obligees or covenantees in personal contracts differ materially from joint-tenants of estates in land, in respect of their power of dealing with their rights. An interest in land, whether joint or several, may be transferred by the act of the party; and the conveyance by a joint-tenant, by release or otherwise, operates on his moiety only; he may convey it to his co-tenant, or to a stranger; whereas a right to sue on a contract cannot be conveyed, though it may be extinguished, and a release by one of the joint parties extinguishes the right of both. It was upon a similar reason, that, in real actions, a nonsuit of one demandant or plaintiff was not the nonsuit of both, but he that made default should be summoned and severed; but in personal actions the nonsuit of one is generally the nonsuit of both: Co. Lit. 139. a. To allow a joint devisee or grantee &c. of land to vest the whole interest in his co-devisee or grantee, &c., by refusing to accept the estate, is allowing him to do no more than he could have done by a release immediately *after* acceptance; but if a joint covenantee could, by refusal, enable his co-covenantee to sue alone, he would do that before acceptance, which he could by no means do after acceptance.

Since, then, the defendant has not incurred any liability to be sued on a separate contract, and since the plaintiff has not acquired the right to enforce in a separate action any liability to which the defendant might be subject in a joint action, it follows, that whether the defendant's original liability be or be not put an end to, this declaration is bad, and the judgment for the plaintiff ought to be reversed.

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Judgment reversed.

JOWETT v. SPENCER.

IN this case, the Court of Exchequer having arrested the judgment (a), a writ of error was brought, and argued in this Court on the 18th of June, 1847 (b), by

Hugh Hill (Addison with him) for the plaintiff.—The meaning of the covenant must be determined by the intention of the parties apparent upon the face of the instrument: *Stevens v. Curling* (c). Adopting that rule of construction, it is no condition precedent that coal should be found. This is not a mere license to get coal, but a grant of all the coals, mines, &c., under a certain messuage and lands, in consideration of the payment of £40 at the periods mentioned. It is evident that the time of payment was one thing contemplated by the parties as the consideration for the grant, since the plaintiff has parted with his whole interest in the mines; and as the deed contains no stipulation

Declaration in covenant stated, that plaintiff, by indenture, granted to defendant all the coals, and mines of coal, under certain land; that defendant covenanted to pay the plaintiff, as the price of the coal so granted, £40 for every statute acre of the said coal which should be found under the said lands, and, until the said price should be fully paid, to pay plaintiff £40,

part of the said price, in each year, by two equal half-yearly instalments, whether the whole of an acre of coal should be gotten in every such year, or not.—Averment, that, at the time of the making of the indenture, there were under the said lands divers, to wit, fourteen acres of coal; and that divers, to wit, thirteen acres of the said coal still remained under the said lands, and that £40 for two of the half-yearly instalments of the said price for the coal aforesaid became due, and still was in arrear and unpaid, to the plaintiff:—Held, on error in the Exchequer Chamber, reversing the judgment of the Court of Exchequer, that the finding of coal was not a condition precedent to the plaintiff's recovering the annual sum of £40.

(a) See the report, 15 M. & W. 662. man, J., Cresswell, J., Maule, J., Wightman, J., and Erle, J.

(b) Before Lord Denman, C.J., Paterson, J., Coleridge, J., Col-

(c) 3 Bing. N. C. 355.

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requiring the defendant to work them within a particular period, he might either abstain altogether or for an indefinite number of years, or work slowly or quickly, at his discretion. The former part of the covenant limits the amount of the consideration; the latter specifies the mode and times of payment. In any other view no effect can be given to both parts of the covenant, and the words, "until the said price or consideration money *should* be paid," must be altogether rejected. *Aspdin v. Austin* (a) shews, that there is no implied covenant on the part of the defendant to work the mines within a reasonable time; and it could never have been the intention of the parties that the defendant should have it in his power to say, "I will not work the mines, and therefore will not pay." The case may be illustrated by the rule laid down with reference to covenants for the payment of money, or performance of any other act, on a day which may or may not happen before the thing which is the consideration for the payment of the money, or the other act, is to be performed; in which case, *performance* is not a condition precedent: 1 Wms. Saund. 320 b, n.; *Hall v. Bambridge* (b). The words, "coal which should be found," must be controlled by the intention of the parties; the one parting with his whole interest in consideration of the other undertaking to pay an annual sum, without reference to the fact of whether the coal was or was not *gotten*. (He then argued, that, at all events, the allegations in the declaration were sufficient to entitle the plaintiffs to recover, and cited 1 Wms. Saund. 228 d, n. (m), *Lord Huntingtower v. Gardiner* (c), *Fletcher v. Pogson* (d), *Hobson v. Middleton* (e), and *Boydell v. Harkness* (f), as authorities to shew, that, if any ambiguity exists, the Court will, after verdict, give such a construction as will support the pleadings.)

Atherton, contra.—The former branch of the covenant

(a) 5 Q. B. 671.

(b) 5 Q. B. 233.

(c) 1 B. & C. 297.

(d) 3 B. & C. 192.

(e) 6 B. & C. 295.

(f) 4 Dowl. & L. 178.

imposes the obligation of paying a certain price for every acre of coal found; the latter branch defines the mode and times in which that price is to be paid. The quantity found would of necessity be uncertain, therefore the parties stipulate that the consideration shall be paid in a particular way. The words, "until the said price or consideration money should be paid," merely prescribe the limit of payment. There is a clear distinction between the words "found" and "existing;" if synonymous, the averment in the declaration should have followed the words of the covenant. As the declaration is framed, the defendant has no opportunity of putting in issue the fact whether coal has or has not been found. (He then argued, that it was consistent with every allegation in the declaration that all the coal found had been paid for, citing *Stennell v. Hogg* (a), and *Sicklemore v. Thistleton* (b).

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Hugh Hill replied.

The judgment of the Court was afterwards delivered by

LORD DENMAN, C. J.—This is an action of covenant on an indenture, whereby the plaintiff conveys to the defendant and his heirs all the coal *lying and being within and under* certain premises, and the defendant covenants to pay £40 for every statute acre of coal which should be *found within or under* the premises, and, until the said price or consideration for the said coal should be fully paid, to pay £40 per annum by half-yearly payments on the 2nd of January and the 2nd of July, commencing from the date of the indenture (*viz.* 2nd of July, 1844), whether the whole of an acre of the said coal should in any such year *be gotten or not*. The declaration avers, that, at the time of the making of the indenture, there were within and under the premises a large quantity of coal, and that a large quantity

(a) 1 Wms. Saund. 228 a.

(b) 6 M. & Sel. 9.

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still remained; but it does not aver that any coals were *found* or *gotten*. The question is, whether the *finding* of coal is a condition precedent to the plaintiff's recovering the annual sum of £40. It appears to us that it is not. The parties seem to have assumed, that there were coals within and under the premises, and the indenture operates as an absolute sale and conveyance of that coal to the defendant, but without any covenant on his part to work or get that coal. The words of the conveying part are, "all the coals lying and being within and under the premises." Whether the defendant at any time should think fit to find and get them, was left entirely to his will and pleasure. The consideration money is £40 per acre for coals *found*, not for coals *gotten*. By the word "found" we apprehend the parties to mean, "ascertained to lie and be." It is necessary that the quantity should be ascertained at some time, in order to fix the ultimate amount of the consideration money. That quantity might be found and ascertained without working or getting the coal. Who then is the proper person to find and ascertain the quantity? Not the plaintiff, for he had parted with all his interest in and possession of the coal, but the defendant, who has taken them. In order to secure his so finding and ascertaining the quantity, the covenant of the defendant to pay £40 per annum till the consideration money should be fully paid is inserted, otherwise, as there is no covenant to work or get the coal, the quantity might never be ascertained. The right of the plaintiff to sue for the annual sum is absolute and without condition, and if, by finding and ascertaining the quantity of the coal, and paying the annual sum stipulated, the defendant has fully paid the consideration money for the purchase of the coal, it is for him to plead those facts. We think, then, that the plaintiff is entitled to keep his verdict, and the judgment of the Court below should be reversed.

Judgment reversed.

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GRAHAM v. INGLEBY and GLOVER.

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THIS was a rule, calling on the defendant Glover to shew cause why an order of *Platt*, B., should not be rescinded, and why the interlocutory judgment, thereby ordered to be set aside, should not be restored. It appeared from the affidavits, that, on the 26th of July, 1847, a declaration was delivered in the action, which was for goods sold and delivered. On the 30th of July, the defendant Glover pleaded in abatement that he was an attorney of the Court of Queen's Bench, and not an attorney of the Court of Exchequer. This plea was verified by an affidavit, the jurat of which was as follows:—"Sworn at Manchester, in the county of Lancaster, this twenty-ninth day of July, 1847. Sam. H. Buckley, a commissioner," (omitting the words "before me"). On the 31st of July, the plaintiff replied by traversing the plea, made up the issue, and delivered it, with notice of trial for the ensuing Liverpool Assizes. On the 4th of August, the defendant struck out the similiter, and delivered a demurrer to the replication. On the 6th of

The 4 Anne, c. 16, s. 11, requiring pleas in abatement to be verified by affidavit, is an enactment for the sole benefit of plaintiffs, and may be waived by them.

Therefore, where a defendant delivered a plea in abatement, with a defective affidavit of verification, and the plaintiff traversed the plea, and made up the issue, and the defendant struck out the similiter, and demurred, and the plaintiff, after an unsuccessful application to set aside

the demurrer as frivolous, obtained two several summonses for time to join in demurrer, and before the time expired signed judgment as for want of a plea:—*Held*, that the judgment was irregular.

An affidavit sworn before a commissioner, omitting in the jurat the words "before me," is bad.

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August, a summons was taken out to set aside the demurrer as frivolous, which summons was dismissed with costs. On the 10th of August, the plaintiff obtained an order for time to join in demurrer until the fifth day of Michaelmas Term. On the 5th of November, the plaintiff obtained an order for four days' further time to join in demurrer. On the 8th of November, the plaintiff signed interlocutory judgment as for want of a plea, treating the plea delivered as a nullity, by reason of the defect in the jurat of the affidavit of verification. On the 17th of November, *Platt*, B., made an order setting aside that judgment for irregularity, with costs, which order the present rule sought to rescind.

Martin shewed cause.—The omission of the words “before me” in the jurat of the affidavit does not render the plea a nullity, but only an irregularity, which has been waived by the subsequent proceedings. In affidavits sworn at judges' chambers, the jurat is invariably in this form. *Empey v. King* (a). [*Parke*, B.—In the case of *Regina v. The Inhabitants of Bloxham* (b), the Court of Queen's Bench considered that a similar defect, in an affidavit upon which a certiorari was granted, could not be waived.] That arose from the provisions of the 13 Geo. 2, c. 18, s. 5, which expressly prohibits a certiorari from issuing, unless it be duly proved on oath that the justices have had notice. The language of the 4 Ann. c. 16, s. 11, is different. It enacts, “that no dilatory plea shall be *received* in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or shew some probable matter to the Court to induce them to believe that the fact of such dilatory plea is true.” That is a provision for the benefit of plaintiffs, and they may waive it by receiving the plea without affidavit. [*Platt*, B.—If the argument on the other side be correct, the plaintiff might go to trial, and

(a) 13 M. & W. 519.

(b) 6 Q. B. 528.

after verdict for defendant sign interlocutory judgment as for want of a plea.] The present case is not distinguishable from *Horsfall v. Matthewman* (a), where it was held, that the plaintiff could not sign judgment after plea in abatement, because the affidavit of verification was sworn before the defendant's attorney. Under the old law, a defendant could not plead in abatement after a general imparlance, but if the plaintiff replied to the plea instead of demurring or alleging the estoppel, the fault was cured. 2 Wms. Saund. 2 e, note (p). [*Alderson*, B.—It appears from a note to the case of *Pether v. Shelton* (b), that where a plea in abatement was put in without affidavit, and the plaintiff signed judgment, the Court set it aside.] It is true, that, in *Garratt v. Hooper* (c), *Taunton*, J., held, that a plea in abatement, if not verified by affidavit, was a nullity which the plaintiff could not waive. That decision, however, is at variance with *Horsfall v. Matthewman* (a).

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The Attorney-General and *Burnie*, in support of the rule.—There is no doubt that a plea of privilege as an attorney of another court is a plea in abatement, and must be verified by affidavit: *Davidson v. Chilman* (d). Then, is the present affidavit sufficient, and if not, has the defect been waived? The case of *Bill v. Bament* (e) shews that a defect in the jurat renders the affidavit invalid. There the affidavit was sworn in the usual way at a judge's chambers, but through mistake was not laid before the judge, and therefore not signed by him; and the Court set aside an order for a *capias* obtained on such affidavit, although, after the execution of the *capias*, the affidavit was presented to the judge, and signed by him. *Alderson*, B., there says, that the judge's signature is part of the jurat. *Regina v. The*

(a) 3 M. & Sel. 154.

(d) 1 Bing. N. C. 297.

(b) 1 Str. 638.

(e) 8 M. & W. 317.

(c) 1 Dowl. P. C. 28.

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Inhabitants of Bluzham (a) expressly decided that the omission of the words "before me," in the jurat of an affidavit sworn before a commissioner, was fatal. The rule is different with respect to affidavits sworn before a judge and those sworn before a commissioner; and it would be dangerous to depart from the uniform practice. The affidavit, being defective, is the same as no affidavit, and consequently the plea is a nullity. That a plea in abatement be accompanied by an affidavit of verification, is a statutable requisite, and cannot be waived. The Lottery Act, 27 Geo. 3, c. 1, s. 2, required a plaintiff, suing for penalties, to make an affidavit, previously to issuing the writ, specifying the amount of the penalties sued for; and where several persons, who had separately incurred penalties under that act, were all joined in one affidavit, it was held that the irregularity was not waived by their putting in bail: *Goodwin* q. t. v. *Parry* (b). So, where interlocutory judgment was signed without appearance entered, it was held a nullity, which could not be waived: *Roberts* v. *Spurr* (c). In *Taylor* v. *Phillips* (d), Lord *Ellenborough* said, that "the regularity or irregularity of proceedings could not depend on the assent of the party afterwards to waive an objection to such proceedings which were in themselves absolutely avoided by statute." [*Parke*, B.—Suppose the plaintiff had demurred to the plea, and obtained judgment of respondeat ouster, could he have waived that, and signed judgment as for want of a plea?] If there were no affidavit, it is submitted that he might, as in such case the statute absolutely prohibits the plea from being received. In *Garratt* v. *Hooper* (e), *Taunton*, J., says, "An affidavit of the truth of all dilatory pleas is required by statute, and no affidavit was here filed. There is no authority to shew that it must not

(a) 6 Q. B. 528.

(b) 4 T. R. 577.

(c) 3 Dowl. P. C. 551.

(d) 3 East, 155.

(e) 1 Dowl. P. C. 28.

be considered a nullity. . . . There is this difference between an irregularity and a nullity. An irregularity may be waived, but a nullity cannot. It is not in the power of a party to waive it. As the act of Parliament declares it to be a nullity, the Court is so to judge of it."

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POLLOCK, C.B.—The rule must be discharged. The affidavit is bad, by reason of the omission of the words "before me" in the jurat. It is the same as if there had been no affidavit.

With respect to the other question, I cannot but yield to the manner in which, in the course of the argument, the point has been put by my brother *Platt*. Suppose there had been no affidavit whatever, and the plaintiff had replied, joining issue, and a trial had taken place, the event of which was a verdict in favour of the defendant, upon which judgment was entered up, could the whole proceedings have been set aside because there was no affidavit? It is clear they could not. The question then is, what is the meaning of the statute of Anne? In my opinion, that act had not any public policy for its object, but solely the protection of plaintiffs against the delivery and effect of dilatory pleas. It enacts, that no such plea *shall be received*, unless verified by affidavit. If a plaintiff chooses to waive that provision, which is introduced for his benefit, he cannot afterwards sign judgment for want of such affidavit. I do not mean to impeach the authority of *Regina v. The Inhabitants of Bloxham (a)*; for in that case there was no party who could give consent, since it was a criminal case. Upon these grounds I think the rule ought to be discharged.

PARKE, B.—I concur in opinion with the Lord Chief Baron. We are bound by the cases of *Regina v. The Inhabitants of Bloxham (a)*, and *Regina v. The Inhabitants of*

(a) 6 Q. B. 523.

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Norbury (a), to hold that this affidavit, having been made before a commissioner, is bad, for omitting in the jurat the words "before me." The case of *Empey v. King* (b), in this Court, is distinguishable, for there the affidavit was sworn before a judge at chambers. The present affidavit is equivalent to no affidavit.

The question then is, what is the meaning of the statute of Anne, which requires an affidavit of verification as a condition precedent to a valid plea in abatement? If that enactment be intended for the sole benefit of plaintiffs, then the maxim applies "*Quilibet potest renunciare juri pro se introducto.*" It is evident that the requirements of that statute are solely for the benefit of plaintiffs, and in order to prevent them from being delayed in their suits; and that they have no reference whatever to other suitors, or the rest of the Queen's subjects. It follows, that although an affidavit is so defective as to amount to no affidavit, a plaintiff may, if he choose, waive the benefit of his right, and join issue on the plea and go to trial; and if he does so, he cannot afterwards avail himself of the provisions of the statute. So, if he should demur to the plea, he would, in like manner, waive the benefit of the statute. If it were otherwise, the inconvenience would be great, as already pointed out. Suppose the plaintiff joined issue, and a verdict was found against him; or, upon demurrer, the Court gave judgment of respondeat ouster—in what a condition would the defendant be, if the plaintiff could afterwards treat the plea as a nullity and sign judgment. This case is distinguishable from *Goodwin q. t. v. Parry* (c), because that case was decided on the ground that the enactment was for the general benefit of the public—whether rightly or wrongly so decided we need not now stop to inquire. So with respect to the case of *Taylor v. Phillips* (d), where

(a) 6 Q. B. 534, n.

(b) 13 M. & W. 519.

(c) 4 T. R. 577.

(d) 3 East, 155.

there was service of process on a Sunday; it is for the benefit of the public that Sunday should be sanctified. The statute relating to pleas in abatement is solely for the benefit of plaintiffs, and they may waive their right if they think fit. I cannot agree with the latter part of the judgment of *Taunton, J.*, in *Garratt v. Hooper* (a), where he says, that the Court is bound to treat as a nullity a plea in abatement not verified by affidavit, though the plaintiff is willing to accept it.

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ALDERSON, B.—The affidavit ought to have followed the usual form; and not having done so, must be treated as no affidavit. But the advantage given by the statute was intended for the benefit of the party suing, and not for the public; and it is evident that a party who has a benefit given him by statute, may waive it if he thinks fit. There are many cases in which no action can be commenced except after certain notice of action. That is a requirement by statute; but if a plaintiff went to trial, and the defendant did not then object to the want of notice, could he afterwards set aside the whole proceedings because no notice was given? It is clear that he could not. With respect to *qui tam* actions, *interest reipublicæ* that nobody should sue but a party having an interest in the subject-matter; but the state says, that, under particular statutes, popular actions may be allowed. That is the principle upon which those cases proceed—whether well founded or not is immaterial—but it is this, that an individual cannot waive a matter in which the public have an interest. It was so in the case of *Regina v. The Inhabitants of Bloxham*; and therefore in that case it was immaterial whether the defect was an irregularity or a nullity, for it could not be waived.

PLATT, B., concurred.

Rule discharged.

(a) 1 D. P. C. 28.

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Jan. 13.

In re CHARLES WRIGHT.

A rule to strike an attorney off the roll of this Court, on affidavit that he has been convicted of a misdemeanor in the Queen's Bench, and struck off the roll of that Court, is a rule nisi, which makes itself absolute, unless cause be shewn within the time prescribed.

F. ROBINSON moved to strike an attorney, of the name of Charles Wright, off the roll of attorneys of this Court, on affidavit that he had been convicted in the Court of Queen's Bench of a conspiracy, and sentenced to be imprisoned, and to have his name struck off the roll of attorneys of that Court. The affidavit further stated, that the name had been struck off accordingly, and that deponent believed that the Charles Wright on the roll of this Court was the same person. It was submitted that the rule ought to be absolute in the first instance.

PER CURIAM (a).—In a serious matter of this nature, the party sought to be affected ought to have an opportunity of denying his identity with the person convicted in the Court of Queen's Bench. The proper course will be to grant a rule nisi, that is, a rule which will make itself absolute unless cause be shewn within a certain time. In this case there ought to be such a rule, to be absolute within a week.

Rule accordingly.

(a) *Pollock, C. B., Parke, B., Alderson, B., Platt, B.*

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Jan. 14.

COVENANT on an indenture for the dissolution of co-partnership between the plaintiff and defendant as attornies and solicitors, dated the 19th of June, 1841. The declaration, after setting out the various recitals in the deed, which are not material to the present question, contained the following covenant and proviso: "And the said John Strutt doth hereby covenant, promise, and agree to and with the said John Galsworthy, that he the said John Strutt shall not nor will, at any time or times hereafter within the next seven years, directly or indirectly, either by himself or in copartnership with another or others, carry on the said practice, profession, or business of an attorney or solicitor within the distance of fifty miles from Ely-place aforesaid, (save as hereinafter mentioned), nor interfere with, solicit, or influence the clients of the said late copartnership; and if the said John Strutt shall in any respect infringe the present covenant, then and in such case he the said John Strutt shall immediately thereupon pay to the said John Galsworthy, his executors, or administrators, the sum of 1000*£*, as and for liquidated damages, and not by way of penalty: provided always, nevertheless, that the said John Strutt shall not be prevented from transacting any matter of business, or being concerned for any person or persons, not being a client or clients of the said copartnership, and upon his remaining properly qualified as an attorney and solicitor, through or by means of the said John Galsworthy as his agent, upon the usual terms, and upon the like charges and costs as are usually paid and allowed by attornies and solicitors to their agents." The declaration contained an averment of general performance on the part of the plaintiff, and concluded with the following breach: "That the defendant, after the making of the said indenture, and before the commencement of the suit, to wit, on &c., and

By a deed for the dissolution of partnership between the plaintiff and defendant, it was covenanted by the defendant that he would not at any time or times thereafter, within the next seven years, directly or indirectly, either by himself or in co-partnership with another or others, carry on the business of an attorney or solicitor within the distance of fifty miles from a place named, nor interfere with, solicit, or influence the clients of the late co-partnership; and that if he should in any respect infringe that covenant, then he should immediately thereupon pay the plaintiff the sum of *£*1000, as and for liquidated damages, and not by way of penalty:—*Held*, that the sum of *£*1000 was, upon the construction of this covenant, to be considered by way of liquidated damages, and not as a penalty.

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on divers other days and times between that day and within seven years next ensuing the date of the said indenture, and before the commencement of the suit, carried on the practice, profession, or business of an attorney or solicitor within the distance of fifty miles from Ely-place in the said indenture mentioned, to wit, in Westminster, otherwise than through or by means of the said plaintiff, as his the defendant's agent; and that, although the defendant had infringed his covenant, he had not paid the said sum of 1000*l*.

To this breach the defendant pleaded payment into court of 50*l*. in the usual form. The plaintiff replied damages ultra; and upon this replication issue was joined.

At the trial before *Pollock*, C. B., at the London sittings after Michaelmas Term last, no evidence was offered by either party; but it was contended by the plaintiff, that by the terms of the deed he was entitled to the full sum of 1000*l*. therein specified. A verdict was thereupon by consent entered for the plaintiff for 950*l*., leave being reserved to the defendant to move to enter a nonsuit.

The Attorney-General now moved accordingly.—The simple question is, whether, upon the true construction of this covenant, the sum of 1000*l*. mentioned in it is to be taken as a penalty, or by way of liquidated damages. The defendant contends for the former construction, as being the correct one.

The defendant's covenant has respect to two several matters: in the first place he covenants not to set up in business within fifty miles of Ely-place; and secondly, not to interfere with the old clients of the firm. Now the proper rule seems to be that laid down in *Kemble v. Farren* (a), which case has been since recognised in *Boys v. Ancell* (b), and *Beckham v. Drake* (c), and in several suc-

(a) 6 Bing. 141; 3 M. & P. 425.

(b) 5 Bing. N. C. 390; 7 Scott, 364. (c) 8 M. & W. 846.

ceeding cases ; and the rule appears to be, that liquidated damages cannot be recovered on an agreement containing various stipulations, of various degrees of importance, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined. In *Horner v. Flintoff* (a), *Parke, B.*, uses language to the same effect, where he says : " The words ' liquidated and settled damages ' must therefore be rejected as being inconsistent with the legal effect of the instrument. If the parties intend it to be construed otherwise, they must contract in clear and express terms, that for the breach of each and every stipulation contained in the agreement a sum certain is to be paid ; and in that case, although the stipulations are of various degrees of importance, they must be held to their contract ;" and *Alderson, B.*, also says, " Where, therefore, the parties do not specifically annex the penalty to each and every of the stipulations in the agreement, it must be taken that, in the case of stipulations of various degrees of importance, it is a penalty only, and not liquidated damages." [*Parke, B.*—The damage which the plaintiff may sustain by the loss of a single client cannot be exactly estimated ; neither can it be foretold what mischief may be done him by the defendant's setting up in business within the prescribed limits. It is for that reason that a fixed sum has been agreed upon. Neither of these events is like the case of a weekly payment, where the sum is fixed.] Where there are several matters provided for of different degrees of importance, the full amount stated is not to be allowed, unless it be specifically annexed to each item. [*Platt, B.*—There is only one object contemplated by the parties to this agreement, which is, that the plaintiff shall carry on his business without being subject to the interference of the defendant.] If he practises, but does not interfere with the plaintiff's clients, he commits a

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(a) 9 M. & W. 678.

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breach of his covenant. [*Parke*, B.—The older cases on this subject are collected in *Evans's Statutes*, Vol. 3, p. 329.] The rule for which the defendant contends is laid down in *Boys v. Ancell* by *Tindal*, C. J., in similar terms to those used in other cases. [*Alderson*, B.—Where there is a certain specified sum, upon the non-payment of which a disproportionately larger sum may be payable, the Courts hold it to be absurd that such larger sum is to be considered as liquidated damages; as for instance, it would be absurd to hold that 500*l.* or 1000*l.* should be paid for the mere non-payment of 3*l.* 6*s.* 8*d.*; but if all the damages which may arise from the breach of the stipulations are wholly uncertain, there is no absurdity in holding that the full amount is recoverable as liquidated damages. *Platt*, B.—How do you distinguish the present case from that of *Rawlinson v. Clarke* (a)?] In that case only a single matter was the subject of the stipulation, which was capable of being done in different ways, and these different modes were expressed for the purpose of defining the meaning of the term *practice*. [*Parke*, B.—We abide by *Kemble v. Farren*, but this case is similar to that of *Green v. Price* (b).]

PARKE, B.—I entertain no doubt in the present case that the rule ought to be refused. It is an action brought upon a covenant to pay one sum of £1000, upon the result of each of several events, one of which is that the defendant should set up in business or practise as an attorney within fifty miles of Ely-place, at any time or times within the space of seven years; another event is, that he should at any time interfere with or solicit the clients of the late copartnership; then follows the stipulation, that the defendant should, in either of those cases, pay one sum of £1000.

Now I take it to be clear, that, upon the true construc-

(a) 14 M. & W. 187.

(b) 13 M. & W. 695.

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tion of this covenant, the defendant would not be bound to pay more than £1000; that is, in case he should violate either of those two or three matters mentioned in the covenant. These matters are each of them incapable of exact estimation. It cannot be said what damage a person may sustain by another setting up in business within a limited period of time or distance, nor how much he may be injured by the loss of one of his clients. The loss may be either great or small; and therefore, in order to avoid all dispute, the parties are content to fix a certain sum, namely, the sum they have mentioned in express terms in their agreement. There is much good sense in what Lord *Mansfield* is reported to have said in the case of *Lowe v. Peers* (a):—“And upon this distinction they proceed in courts of equity. They will relieve against a penalty upon a compensation. But where the covenant is to pay a particular liquidated sum, a court of equity cannot make a new covenant for a man; nor is there any room for compensation or relief. As in leases containing a covenant against plowing up meadow, if the covenant be ‘not to plow,’ and there be a penalty, a court of equity will relieve against the penalty, or will go even farther than that (to preserve the substance of the agreement): but if it is worded, ‘to pay £5 an acre for every acre plowed up,’ there is no alternative, no room for any relief against it, no compensation; it is the *substance* of the agreement. Here the specified sum of £1000 is found in damages. It is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the proper quantum of the damages. . . . It is therefore clear, that where the precise sum is not the essence of the agreement, the quantum of the damages may be assessed by the jury; but where the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damage, and the jury are confined to it.” Now it is per-

(a) 4 Burr. 2225.

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fectly competent to parties to make a stipulation to pay a fixed sum for the breach of a covenant, the damage arising from which it is extremely difficult to ascertain; and I think that it is not an unreasonable stipulation which the defendant has made, that he should pay £1000 upon the event of either of the matters mentioned in this agreement.

But it is said that we are bound by the law, as laid down in *Kemble v. Farren*, to hold, that where a sum is to be paid upon the event of several different matters, to none of which the sum mentioned is precisely fixed, the sum is to be taken as a penalty, and the words "liquidated damages" are to be rejected. We have certainly always abided by the doctrine there laid down, and I do not think it interferes with our opinion in the present case. *Tindal, C. J.*, in delivering the judgment of the Court in that case, says, "It is undoubtedly difficult to suppose any words more precise or explicit than those used in the agreement, the same declaring not only affirmatively that the sum of £1000 should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature thereof; and if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1000. . . . In many cases such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases it saves the expense and difficulty of bringing witnesses to that point. But in the present case the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of 3*l.* 6*s.* 8*d.* per day; or, on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been concluded that the clause in question in either case would have given the stipulated damages of £1000. But that a

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very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms." He then afterwards says, "It has been argued at the bar that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of *Astley v. Weldon*." I take that to be the correct exposition of the rule; and that it would be competent for the parties to make a stipulation to pay a certain sum on the non-performance of a covenant to pay a smaller sum; but they must do so in express terms; and if that be done, I do not see how the Courts can avoid giving effect to such a contract. The rule is correctly laid down in *Kemble v. Farren*; and I said in the cases of *Horner v. Flintoff* and *Beckham v. Drake*, that we were bound by that decision. In the more recent case of *Green v. Price*, I said, "The principle is, that, although the parties may have used the term 'liquidated damages,' yet if the Court can see, upon the whole of the instrument taken together, that there was no intention that the entire sum should be paid absolutely on non-performance of any of the stipulations of the deed, they will reject the words, and consider it as being in the nature of a penalty only." And my brother *Alderson* there said, "But where the damage is altogether uncertain, and yet a definite sum of money is expressly made payable in respect of it, by way of liquidated damages, those words must be read in their ordinary sense, and cannot be construed to import a penalty." The law is correctly laid down in that case. Here a sum of money is to be paid by the defendant for setting up in business within certain limits and within

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a certain time. Now the damage incurred may be very different, according to the time when the defendant sets up in business, whether it be near the beginning or end of the time. Parties are bound by their contracts, if those contracts be clearly made. It is clear that the defendant stipulated to pay £1000 for the breach of any one of the conditions mentioned; and they are such that the damage arising from the violation of any of them cannot be exactly estimated beforehand. It is entirely a question of construction, and for the Court to ascertain the intention of the parties and the meaning of the words they have used:

ALDERSON, B.—I am of the same opinion. It seems to me, that, upon looking at the several cases which have been decided on this subject, the rule is clear, although perhaps it may not have been so distinctly expressed as could be wished. It is entirely a question of construction; and the rule seems to be this, that where there are many and different stipulations in an agreement, the breach of any of which gives rise to a definite amount of damage, and for which a disproportionate sum is annexed, it is not reasonable to hold that the parties intended the whole amount to be paid. In *Kemble v. Farren*, it was not reasonable to suppose that the parties intended that £1000 should be paid on the non-payment of 3*l.* 6*s.* 8*d.* only. So in *Beckham v. Drake*, it was not reasonable to infer that the amount assigned as liquidated damage should be awarded for a breach of covenant of which the actual amount, as apparent on the face of the instrument itself, was only 3*l.* 3*s.*; and therefore the Court, in that case, construed the sum to be a penalty, and not liquidated damages. But where the damage cannot be ascertained, what absurdity is there in a party saying there shall be a fixed sum? and therefore in such case the Courts may give the words their plain and ordinary meaning. The amount of damage which a person might sustain by another's practising within fifty miles for the period of seven years,

would not be the same in amount as if he were to practise within forty miles, or next door, nor the same if he had set up in business in the first, second, or sixth year. In one case the damages might be small, and in the other large; but the parties have agreed to a certain fixed sum, in order to prevent the necessity of being at the expense of procuring the attendance of witnesses for the purpose of giving evidence upon those matters. If, in the case of *Kemble v. Farren*, it had been stipulated that for the breach by the non-payment of the agreed amount, there should be £1000 paid as liquidated damages, I am not prepared to say that the party would not have been bound to that precise sum. The case of *Green v. Price*, which was followed by that of *Rawlinson v. Clarke*, in which the same principle was acted upon, is not distinguishable from the present.

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PLATT, B.—I am of the same opinion; and I concur with my brother *Parke* in the limitations he has applied to this case. It seems to me, that if all the damages are uncertain and general, there is no reason to alter the distinct words of the contract entered into by the parties. Here it is clear that the covenant, on the breach of which this sum is to be paid, was to protect the plaintiff's business from the interference of the defendant. It is clear that such is the substance of the intention of the parties; and it was therefore agreed, that, in the event of any one of the acts stipulated against being done by the defendant, then he should be liable to pay the sum of £1000 as liquidated damages. I am unable to distinguish this case from that of *Rawlinson v. Clarke*. I think, therefore, that the sum recovered was right, and that there ought to be no rule.

POLLOCK, C. B.—I entirely agree with the rest of the Court. I think that this matter has already been decided. The case of *Kemble v. Farren* is a direct authority, that where the injury provided against is altogether uncertain,

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the sum specified is to be taken as liquidated damages. The rule is correctly laid down by Lord Chief Justice *Tindal* in that case; and I think that the present falls entirely within the principle there laid down. I therefore concur with the rest of the Court in thinking that there ought to be no rule.

Rule refused.

Jan. 17. MARSH v. RICHARD DAVIES, ROBERT TIBBOTT, JAMES DAVIES, and WILLIAM EVANS.

An order of removal made from the parish of C. to that of L. having been confirmed by an order of justices in quarter sessions, upon a preliminary objection, a rule nisi was obtained for a mandamus to the justices, to enter continuances and hear the appeal. A copy of the rule was served on two of the defendants, R. D. and R. T., who then were churchwardens of C. R. T. afterwards, in conjunction with the then overseers of C., signed a retainer to the plaintiff, to act as

DEBT for work and labour by the plaintiff as an attorney, and for money paid, and for money found to be due on an account stated. The defendants pleaded, first, that they were never indebted; and, secondly, that the plaintiff did not, one month before the commencement of the action, deliver or send a bill of charges, subscribed according to the statute. Upon these pleas issue was joined, and the cause was tried before Lord *Denman*, C. J., at the Summer Assizes for Montgomeryshire, 1846, when a verdict was found for the plaintiff for the amount of the debt, 109*l.* 7*s.* 8*d.*, and 40*s.* costs, subject to the opinion of this Court upon the following case:—

On the 18th of December, 1843, an order was duly made by two justices for the removal of one Hugh Hughes and family from the parish of Carno, in the county of Montgomery, to the parish of Llanycil, in the county of Merioneth. The paupers were removed to Llanycil under this order on the 13th of January following, no notice of appeal having been given. The overseers of the poor of Llanycil then entered and respited an appeal at the ensuing

their attorney in the matter of the mandamus, but countermanded it before anything was done by the plaintiff. R. D. did not interfere. Before the rule was argued, J. D. and W. E., the other defendants, were elected overseers, and R. D. and R. T. re-elected churchwardens. The plaintiff's clerk saw J. D. repeatedly about the rule, who asked how the matter was going on; he also repeatedly saw W. E., the other defendant, who was not so active. The plaintiff having delivered his bill of costs to one of them, they all expressed their readiness to pay, but said there was a grudge in the parish:—*Held*, that the defendants were not jointly liable.

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Montgomeryshire sessions, in April 1844, and this appeal came on to be heard at the following Midsummer Sessions, July 4th, 1844. A preliminary objection was taken by the respondents to the appellants being heard, that they had not given twenty-eight days' notice of their intention to try, in compliance with a rule of that Court. The justices held this objection to be fatal; and, without entering into the merits, confirmed the order, with costs. In Michaelmas Term, 1844, the appellants obtained a rule nisi from the Court of Queen's Bench, calling upon the justices of Montgomeryshire to shew cause why a writ of mandamus should not issue, commanding them to enter continuances and hear the appeal. Copies of this rule were served upon Richard Davies, who then and from thence until and at the time of commencing this action was one of the churchwardens of the parish of Carno; and upon Griffith Gittins, then one of the overseers of the poor, and the defendant, Robert Tibbott, the other churchwarden. After Gittins had been served with a copy of the rule nisi, he called upon the plaintiff, at his office, to consult him on the subject, and signed a written retainer, of which the following is a copy:—

“Parish Officers of Llanycil, Appellants; and Parish Officers of Carno, Respondents.

“Mr. John Marsh, solicitor, Carno.

“We do hereby retain you as our attorney to shew cause on our behalf against a rule obtained by the appellant parish, for directing continuances to be entered for trying this cause on the merits. And we hereby instruct you to take such steps in the matter as you may think proper. Dated this 18th day of December, 1844.

(Signed) “GRIFFITH GITTINS,
 “The mark x of ENOCH MORGAN, } Overseers.
 “ROBERT TIBBOTT, Churchwarden.

“Witness—W. J. EDWARDS.”

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The defendant Robert Tibbott, one of the churchwardens, shortly afterwards signed the retainer, and Enoch Morgan, the other overseer, put his mark thereto (not being able to write), after it had been read over and explained to him in the presence of a witness. On the 20th of January, 1845, the defendant Robert Tibbott gave the plaintiff notice in writing countermanding such retainer. The following is a copy:—

“ Sir,—On December 27th, 1844, I requested you not to proceed against Mr. Lloyd Williams’ mandamus. I again declare that I will not be responsible for any expense you may incur contrary to my direction, as well as contrary to the wishes of all the parishioners. I am, &c.

“ ROBERT TIBBOTT.”

The defendant Richard Davies was never asked to sign the retainer, and did not interfere. The plaintiff procured copies of the affidavits upon which the rule nisi had been obtained from his agents in London, and caused affidavits to be prepared, and drew up a brief for counsel to shew cause against the rule. Before the rule was argued there occurred a change in the parish officers. In the month of March, 1845, the defendants, James Davies and William Evans, were duly elected overseers of the poor, in the room of Griffith Gittins and Enoch Morgan. The other two defendants, Richard Davies and Robert Tibbott, were re-elected to the office of churchwardens. The plaintiff’s clerk saw James Davies repeatedly about the rule, who asked him how the matter was going on. He also saw William Evans repeatedly about it, but he was not so active, James Davies being the manager. James Davies often inquired of Griffith Gittins how the affair was going on in London.

The rule came on for argument in Trinity Term, 1845, June 11th, in the Bail Court of the Queen’s Bench; and after consideration Mr. Justice *Wightman* discharged the

rule, without costs. At the latter end of June, 1845, the plaintiff communicated the result to the defendant James Davies, and to other parishioners. On the 28th of January, 1846, the plaintiff delivered to the said James Davies a bill of his costs and charges, duly signed and headed, and directed as follows:—

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“The Churchwardens and Overseers of the Poor of the Parish of Carno, Montgomeryshire;

“To John Marsh, Drs.

“The churchwardens and overseers of the poor of the parish of Llanycil, Merionethshire, appellants; and yourselves, respondents.

“As to the removal of Hugh Hughes, a pauper, and his family, in the matter of an application by the said appellants to the Court of Queen’s Bench for a mandamus to the justices of Montgomeryshire to enter continuances and hear appeal on the merits.”

All the defendants expressed readiness to pay, but said there was a grudge in the parish. No bill was delivered by the plaintiff to any of the other defendants. James Davies afterwards caused a parish vestry to be summoned, at which it was determined to resist payment of the bill; and this action was commenced in the following March, more than a month after the delivery of the bill.

Upon this state of facts it was contended at the trial, for the defendants, that the plaintiff ought to be nonsuited: first, on the ground that the four defendants were not the proper parties to be sued; secondly, that the delivery of the plaintiff’s bill of costs to James Davies alone was not a sufficient delivery thereof within the stat. 6 & 7 Vict. c. 73.

If the Court should be of opinion that the action was properly brought against the present defendants, and that the plaintiff’s bill of costs was duly delivered in compliance with the statute, the verdict on both issues for the plaintiff is to stand as entered. If the Court should be of a con-

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trary opinion on either of the above points, then a nonsuit is to be entered, or a verdict for the defendants, as the Court may direct.

Townsend, for the plaintiff.—There are two questions for the consideration of this Court. The first is, whether the action was properly brought against the present defendants. It is submitted that all the defendants are liable. [*Pollock*, C. B.—How can you maintain the action against William Evans? He did not sign the retainer.] The case of *Rex v. Beeston* (a) shews that where, under an act of Parliament, the churchwardens and overseers are enabled, with the consent of the major part of the parishioners, to contract for the providing for the poor, it is not necessary that all the churchwardens and overseers should concur; the contract of the majority of them will bind the rest. In *Welby v. Brown* (b), which occurred in this Court, and which was an action against an ex-overseer, *Parke*, B., thought there was no evidence to fix the defendant personally. [*Parke*, B.—That is an authority against you; for there the question was whether the overseer was personally liable.] In *Kirby v. Banister* (c), which was an action against five parish officers, it was held that all were liable for goods supplied to paupers by the plaintiff, although the orders had been signed by three only. [*Parke*, B.—It is impossible to say that churchwardens and overseers are partners, so as to bind each other. How can you bind four persons, if one of them distinctly refuses to be bound? *Pollock*, C. B.—In *Kirby v. Banister*, *Patteson*, J., puts the case on this ground: He says, “It was not requisite that all five should have been present when each order was given, or should have actually made a promise respecting such order. If it were so, there would be great inconvenience where five parish officers were concerned; and it might even

(a) 3 T. R. 592. (b) Not reported. (c) 5 B. & Ad. 1069.

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be arranged so that the whole five should never interfere on any occasion. It was for the jury to say to whom the credit was given."] *Malkin v. Vickerstaff* (a) is an authority that an overseer is bound by the contract of his co-overseer. In the next place, if an agent has made a contract without authority from his principal, and it is afterwards ratified, the principal may be sued upon it (b). Here the ex-overseers may be considered as the agents of their successors, although at the time the contract was entered into by them they had no authority; and there is evidence that they adopted it. The defendants should have disaffirmed the acts of their predecessors. [*Parke, B.*—There is no adoption of the contract. As to Tibbott, how can it be said that he agreed to be personally liable, when he said he would not be bound?]

Welsby, contra, was not called upon.

PARKE, B.—There must be judgment of nonsuit in this case, which is an extremely plain one. If the retainer be looked at, it appears that one party is not bound, as he disclaimed his retainer; and there is no evidence of his having afterwards revoked that disclaimer. The truth is, the defendants would have been glad that the money should have been paid out of the parish funds, which was prevented only by a feud that existed in the parish.

POLLOCK, C. B.—In this case there is an action against four persons, against one of whom there never was any beginning.

ALDERSON, B., and PLATT, B., concurred.

Judgment of nonsuit.

(a) 3 B. & Ald. 89.

(b) Story on Agency, 208.

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A testator devised three several estates to his three daughters, M., C., and L., for their respective lives, with remainder to their children, as tenants in common in fee, provided that if any or either of them should die without issue, the property given to such daughters should go and accrue to the "survivors or survivor," in equal shares, as tenants in common; and if all except one should die without issue, then the shares of such daughters so dying should go to the "survivor," her heirs and assigns, for ever. On the 3rd October, 1841, C. died, leaving a son. On the 25th October, 1841, L. died, without having had issue. On the 22nd December, 1841, M. and her husband conveyed to a trustee, as well the property devised to her for life as that devised to L., to hold to the use of M., for the joint lives of herself and her husband, with remainder to the survivor in fee:—*Held*, that the word "survivor" in the will must be construed according to its ordinary meaning; and that, on the death of L., the property given to her for life vested absolutely in M. in fee.

Also, that the son of C. could, under no contingency, become entitled to any interest in the property given to M. for life.

Also, that, under the will and deed, the husband of M., in her right, had an estate in possession during the joint lives of himself and his wife.

BY order of Vice-Chancellor *Knight Bruce*, the following case was stated for the opinion of this Court:—

John Cook, late of West Bromwich, in the county of Stafford, cooper, deceased, was, at the respective times of making his will hereinafter mentioned, and of his decease, seised for an estate of inheritance in fee-simple in possession of the three several properties in his said will respectively described, and thereby devised to his three daughters therein mentioned respectively, for their respective lives.

The said John Cook, on the 24th day of February, 1840, duly made and executed his said will, (so far as material to the present case), as follows:—

"I give and devise to my eldest daughter, Mary Ann, the wife of Henry Stone, of West Bromwich, pawnbroker, all that my messuage, tenement, or dwelling-house, where I now reside, situate in High-street, in West Bromwich aforesaid, with the shop, yard, outbuildings, and premises thereto belonging, and also all that newly-erected messuage, tenement, or dwelling-house, adjoining to the last-mentioned messuage, tenement, or dwelling-house, on the north-west side thereof, with the shop, garden, outbuildings, and premises, behind the same, and thereto belonging; To hold unto my said daughter Mary Ann Stone and her assigns, for and during the term of her natural life, to and for her own use and benefit, subject nevertheless to and charged and charge-

able as hereinafter mentioned. And from and after the decease of my said daughter Mary Ann Stone, I give and devise the said two messuages, tenements, or dwelling-houses, shops, gardens, and premises, unto all and every the child and children lawfully begotten of my said daughter Mary Ann Stone, if more than one, to be equally divided between them, share and share alike, as tenants in common, and not as joint tenants; and if there shall be but one such child, then to such only child, his or her heirs and assigns for ever. And I do hereby charge and make chargeable the property hereinbefore given to my said daughter Mary Ann Stone for life as aforesaid, with the payment of two several sums of twenty pounds, one of which sums I give and bequeath to my daughter Charlotte Angell, and the other I give and bequeath to my daughter Lucy Cook. And I give and devise unto my said daughter Charlotte Angell all those my three messuages, tenements, or dwelling-houses, situate in the High-street, in West Bromwich, aforesaid, adjoining to the south-east side of the messuage or dwelling-house where I now reside, together with the outbuildings, gardens, and premises thereto belonging, and also all those three other messuages, tenements, or dwelling-houses, adjoining the said last-mentioned messuages or dwelling-houses, situate in Water-street, in West Bromwich, aforesaid, together with the outbuildings, gardens, and premises thereto belonging; To hold unto my said daughter Charlotte Angell, and her assigns, for and during the term of her natural life, to and for her own use and benefit. And from and after the decease of my said daughter Charlotte Angell, I give and devise the same messuages, tenements, or dwelling-houses, land, and premises, unto all and every the child or children of my said daughter Charlotte Angell lawfully begotten, if more than one, to be equally divided between them, share and share alike, as tenants in common, and not as joint tenants; and if there shall be but one such child, then to such only child, his or

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her heirs and assigns for ever. And I give and devise unto my daughter Lucy Cook all those my three messuages or dwelling-houses standing and being in the High-street, in West Bromwich aforesaid, at the north-west side of the messuages or dwelling-houses hereinbefore given to my said daughter Mary Ann Stone, with the gardens, outbuildings, and premises thereto belonging; To hold unto my said daughter Lucy Cook, and her assigns, for and during the term of her natural life, to and for her own use and benefit. And from and after the decease of my said daughter Lucy Cook, I give and devise the said messuages, tenements, or dwelling-houses, land, and premises, unto all and every child and children lawfully begotten of my said daughter Lucy Cook, if more than one, share and share alike, as tenants in common, and not as joint tenants, and if there shall be but one such child, then to such only child, his or her heirs and assigns for ever. Provided always, and it is my will, that if any or either of my said daughters shall depart this life without having lawful issue of her body or bodies, that then and in that case, the property hereinbefore given to such daughter, so dying, shall go and accrue to the survivors or survivor of my said daughters, their or her heirs, executors, administrators, and assigns, in equal shares and proportions, as tenants in common, and not as joint tenants. And if all my daughters, except one, should depart this life without having lawful issue, then I direct that the shares of such daughters, so dying, shall go to the survivor of my said daughters, her heirs, executors, administrators, and assigns for ever."

The said John Cook died on the 24th day of January, 1841, without having revoked or altered his said will, and leaving his said three daughters, (that is to say), Mary Ann, the wife of Henry Stone, Charlotte, the wife of John Angell, and Lucy, the wife of John Atkins, (in the said will called Lucy Cook), his only children and co-heiresses at law.

The said Charlotte Angell died on the 3rd day of October, 1841, intestate, and leaving a son John Cook Angell, her only child and heir-at-law.

The said Lucy Atkins died on the 25th day of October, 1841, an infant under the age of twenty-one years, and without leaving or ever having had issue, and she left her sister, the said Mary Ann Stone, and her nephew, the said John Cook Angell, her co-heirs at law.

By an indenture of release, bearing date the 22nd day of December, 1841, and made and duly executed between and by the said Henry Stone and Mary Ann his wife of the one part, and John Dumbell, therein described, of the other part, (which said indenture was expressed to be made in pursuance of the act of Parliament passed in the fourth year of her present Majesty, and intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release between the same Parties," and was duly acknowledged by the said Mary Ann Stone, as by law required for rendering effectual conveyances by married women), all the said property by the said will of the said testator, John Cook, devised to the said Mary Ann Stone for life, and also all the said property by the said will devised to the said Lucy Atkins for life, together with all the appurtenances thereunto belonging respectively, and all the estate, right, title, interest, property, possibility, claim, and demand whatsoever of them the said Henry Stone and Mary Ann his wife, and of each of them, into and out of the same premises, were, (inter alia), in consideration of the sum of ten shillings to the said Henry Stone and Mary Ann his wife, paid by the said John Dumbell, duly conveyed by the said Henry Stone and Mary Ann his wife unto the said John Dumbell and his heirs, To have and to hold the same unto the said John Dumbell and his heirs; nevertheless to the use of the said Mary Ann Stone and her assigns, for and during the joint natural lives of them the said Henry Stone and Mary Ann

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his wife, without impeachment of waste, and her receipts alone for the rents and profits to be from time to time good discharges. And from and immediately after the decease of either of them the said Henry Stone and Mary Ann his wife, to the use of the survivor of them the said Henry Stone and Mary Ann his wife, his or her heirs and assigns for ever.

The said Henry Stone and Mary Ann his wife and John Cook Angell are all now living, and the said Mary Ann Stone has not and has never had any issue.

The questions for the opinion of the Court are—

First, whether the said Mary Ann Stone, or the said Henry Stone and Mary Ann Stone his wife, in her right, has or have any and what estate in possession in the property by the said will devised to the said Lucy Atkins for life.

Secondly, whether the said John Cook Angell has any and what estate in possession in the property by the said will devised to the said Lucy Atkins for life.

Thirdly, whether, contingently or otherwise, the said John Cook Angell has any and what estate in reversion, remainder, or expectancy in the property by the said will devised to the said Lucy Atkins for life.

Fourthly, whether the said Mary Ann Stone, or the said Henry Stone and Mary Ann his wife, in her right, has or have any and what estate in possession in the property by the said will devised to the said Mary Ann Stone for life.

Fifthly, whether, contingently or otherwise, the said John Cook Angell has any and what estate in reversion, remainder, or expectancy in the property by the said will devised to the said Mary Ann Stone for life.

Rose, for Mary Ann Stone and Henry Stone, (Nov. 15).

—First, as to the property devised to Lucy Atkins. Upon the death of Lucy Atkins, Mary Ann Stone took an estate in fee-simple in the whole of the property devised to Lucy Atkins, and John Cook Angell took no interest whatever in that property. The cases collected in Jarman on

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Wills (a) shew that the word "survivor," like every other term, when unexplained by the context, must be interpreted according to its strict literal meaning. In the case of *Ferguson v. Dunbar* (b), the testator gave to his executor so much of his personal estate as would purchase an annuity of £550, which he gave to his wife for life, and he directed the principal, after her decease, to be paid to his children, that is to say, one half to his son George, and the other half to his daughters Elizabeth and Charlotte equally, if living at the death of their mother; and if any of them should die in the lifetime of their mother leaving issue, he gave that share to the issue of such child or children equally, at the age of twenty-one years, or day of marriage; but if any of them should die before the age or twenty-one years without issue, he gave that share to the *survivors*; and if all of them should die without leaving children, the same was to fall into the residue. Charlotte died leaving children. Elizabeth afterwards died under age and without issue. The question was, whether the children of Charlotte were entitled to any part of the share of Elizabeth. Lord *Thurlow* said, that this was one of those cases in which he had the mortification to see, that what was most probably the testator's intention could not be executed for want of his having been properly advised and having sufficiently explained himself; that he thought the testator meant the children should take the share which would have accrued to the parent if living; but not having said so, but limited such share to the survivors or survivor, he must declare George, as the only surviving child, entitled to the whole of Elizabeth's share, and decreed accordingly. So, in the case of *Crowder v. Stone* (c), where a testator bequeathed certain stock to his executors in trust for his wife and brother for their respective lives, and after the decease of the survivor, to be divided equally between his

(a) Vol. 2, p. 609. (b) 3 B. C. C. 468, n. (c) 3 Russ. 217.

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nephew and four nieces; and in case of the death of his said nephew or of any or either of his said nieces without lawful issue before their respective parts or shares should become due and payable to them, then the part or share of him, her, or them, so dying without issue, should go and be equally divided between and amongst the *survivor and survivors* of them, share and share alike. At the decease of the testator's wife, (who survived his brother), one niece only was alive, several of the deceased nieces having left issue; and it was held, that the survivor was entitled to the whole. Lord *Lyndhurst*, in delivering judgment, says, "It was contended, that the words 'survivor and survivors of them' were to be construed 'other and others.' That is a construction which the Court has in some cases put upon those or similar words; but it is what Lord *Eldon* in *Davidson v. Dallas* (a) calls a 'forced construction of the term survivor;' and he contrasts it with what he calls its 'natural meaning.' It is a construction which the Court may sometimes be compelled to adopt, in order to accomplish the intention which appears on the whole of the will; and in *Wilmot v. Wilmot* (b), it was scarcely possible to put any other meaning on the words. But in looking at the language and the provisions of this will, I do not find any such necessity; and it seems to me that the words 'survivor and survivors' are here to be taken in their natural meaning. The shares which became subject to the operation of the bequest to the survivor and survivors will be divisible among such only of the five legatees as were living at the time when the events happened on which the shares were to go over respectively." In *Milsom v. Awdry* (c), the words "survivors and survivor" were construed according to their strict literal meaning, although such construction led to an intestacy. That was the case of a residuary bequest to the testator's nephews and nieces, per stirpes equally for their

(a) 14 Ves. 576. (b) 8 Ves. 10. (c) 5 Ves. 465.

lives, and after the death of either, that share to be paid equally to and among the children of such of his said nephews and nieces as should happen to die, and if any of his said nephews and nieces should die without leaving any child or children, then the share of him, her, or them so dying, should go to and among the *survivors and survivor* of them. One nephew died without leaving issue; then another died leaving issue; a third then died without issue, leaving a sole survivor. Sir *R. P. Arden*, M. R., decided, that the share of the third belonged exclusively to the survivor, and was not divisible between him and the issue of the second. Again, in *Davidson v. Dallas* (a), the same strict construction was put on the term "survivors;" Lord *Eldon* observing, that "there was nothing in the will indicating a general intention upon which the forced construction of the term 'survivors' had been adopted. The words must therefore have their natural meaning." In *Leeming v. Sherratt* (b), Sir *James Wigram*, V. C., held that the strict construction of the term must prevail. He says, "In *Davidson v. Dallas*, Lord *Eldon's* language obviously imports that the word 'survivors' is to be construed in its natural sense, unless the will itself shews that it was used by the testator in a different sense." There is nothing in this will to indicate that the testator used the term "survivor" in any other than its ordinary sense. As to the property devised to his daughters, he gives them life-estates only; but in the event of either of them dying without issue, he makes a different disposition, and gives to the survivors or survivor the fee-simple in the share of the deceased. It is difficult to see what language could have been used more plainly indicating an intention to give the surviving daughters an estate in fee. If the word "heirs" receives its natural interpretation, there can be no tenancy in common between Mary Ann Stone and John Cook Angell. The

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(a) 14 Ves. 576.

(b) 2 Hare, 14.

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object of the latter part of the proviso was to meet an event which cannot now happen. If the first daughter had died without issue, the survivors would have taken an estate in fee-simple as tenants in common; and the testator intended that the latter part of the proviso should operate by way of executory devise of the accruing share in the event of the second daughter dying without issue.

Secondly, with respect to the property devised to Mary Ann Stone, the testator gives each of his daughters an estate for life, with remainder in fee to their children, so that each child when born would take a vested interest: *Doe v. Perryn* (a), *Right v. Creber* (b), *Doe v. Hopkinson* (c). But until the contingency happened, the inheritance descended to the testator's heir-at-law. The result of which would be, that if all the daughters were without issue at the time of his death, the inheritance would descend to them as co-heiresses. Upon the death of Lucy Atkins without children, John Cook Angell and Mary Ann Stone took each a moiety of the inheritance as co-heirs of the testator. Consequently, at the time of the execution of the deed of the 22nd of December, 1841, Mary Ann Stone had an estate for life in the share originally devised to her, and also a moiety of the inheritance. That is now subject to the uses declared by the deed. The effect of that conveyance was to merge the life-estate in the reversion, and to destroy the contingent remainder: *Purefoy v. Rogers* (d), *Mansell v. Mansell* (e), *Fearne on Contingent Remainders*, 339.

Winser, for John Cook Angell.—Upon the death of Lucy Atkins, John Cook Angell took an estate in fee-simple in her share, as tenant in common with Mary Ann

(a) 3 T. R. 484.

(b) 5 B. & C. 866.

(c) 5 Q. B. 223.

(d) 2 Saund. 380.

(e) 2 P. Wms. 678.

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Stone; and upon the death of the latter without issue, he would be entitled to the whole estate. The word "survivor" requires such an interpretation, in order to carry out the intention of the testator. If the words "survivors or survivor" in the former part of the proviso signify "others or other," as they clearly do, the word "survivor," in the latter branch of the proviso, must receive the same construction. In the former part of the proviso the testator uses the word "property;" in the latter, the word "share." Those words are not identical in their meaning; but the word "share" was intended to apply to the share which *accrued* to the survivors on the death of the first daughter. The last surviving daughter could only take an *accruing* share. A different construction of the word "survivor" would create an intestacy as to this property, on the death of Mary Ann Stone without children. It is true that the word "survivor" has, in some instances, been construed according to its ordinary meaning; but, in those cases, the context and general intention of the testator expressed on the face of the will required such a construction. Here the context and general intention shew that the words "survivors or survivor" ought to be construed "others and other." In *Toldervy v. Colt* (a), Lord Abinger, C.B., says, "A Court of justice has no right, in interpreting a will, to make a probable conjecture of what a testator would have done in a particular case, and then to do it for him, when there are no words in the will to justify that course." In *Harman v. Dickinson* (b), the testator bequeathed equal sums for the benefit of his two granddaughters for life and their children respectively; but, if either died without issue, her share to go to the children of the survivor. One of the granddaughters married and died in the lifetime of the other, leaving children; the other died unmarried: and it was held, that the children took each of the shares. In

(a) 1 M. & W. 287.

(b) 1 Bro. C. C. 91.

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Aiton v. Brooks (a), the testator bequeathed certain stock to A. and B. for their lives, and on their deaths to their children then living, who should attain the age of twenty-one years; but in case any of the children should die before they attained that age, the testator gave the share of such deceased child to the survivor; provided, that in case either A. or B. should leave any child living at their respective deceases, but which should all die before they attained the age of twenty-one years, then the share of such legatee so dying should go to the survivor of them the said A. and B. A. died in the lifetime of B., leaving a child, who attained twenty-one: B. afterwards died without issue. *Shadwell, V. C.*, held, that A.'s personal representatives were entitled to B.'s moiety, observing, that the word "survivor" must of necessity be taken to mean "other;" for the testator contemplated the event, not of one of the legatees dying in the lifetime of the other, but of one of them dying childless. A similar construction was put upon the word "survivor" in *Doe v. Wainewright* (b) and *Leake v. Robinson* (c).

Then, as to the effect of the deed of the 22nd of December, 1841, there could be no merger. Treating the devise as two separate limitations, there is, first, an estate for life to each of the daughters, then a contingent remainder to the unborn children, with an alternative contingent remainder to the survivor, and an executory devise over: *Brownsword v. Edwards* (d), *Doe v. Howell* (e). The deed would only operate to defeat the contingent remainders, but would have no effect on the executory devise: Cruise's Dig. tit. xxxix. Merger, ss. 80, 84.

Rose replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

(a) 7 Sim. 204.

(d) 2 Ves. 243.

(b) 5 T. R. 427.

(e) 10 B. & C. 191.

(c) 2 Mer. 394..

POLLOCK, C. B.—The question in this case is, whether the words “*survivor or survivors*,” occurring in the will of John Cook, are to be construed according to their natural import, or as meaning “*other or others*.”

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The testator had three daughters, Mary Ann, the wife of Henry Stone, Charlotte, the wife of John Angell, and Lucy, afterwards the wife of John Atkins, but who at the date of the will was unmarried.

By the will in question, the testator gave a real estate to his daughter Mary Ann for her life, with remainder to her children as tenants in common in fee; and he gave another real estate to each of his two other daughters, Charlotte and Lucy, for their respective lives, with like remainders to their respective children in fee. Then follows this proviso: —“ Provided always, and it is my will, that if any or either of my said daughters shall depart this life without having lawful issue of her body or bodies, that then and in that case the property hereinbefore given to such daughter so dying, shall go and accrue to the *survivors or survivor* of my said daughters, their or her heirs, executors, administrators, and assigns, in equal shares and proportions, as tenants in common, and not as joint tenants. And if all my daughters, except one, should depart this life without having lawful issue, then I direct that the shares of such daughters, so dying, shall go to the *survivor* of my said daughters, her heirs, executors, administrators, and assigns, for ever.”

The testator died in January, 1841. On the 3rd of October following, Charlotte Angell died intestate, leaving a son, John Cook Angell, her only child and heir. And on the 25th of the same month of October, 1841, Lucy Atkins died an infant, never having had any child.

The case states, that, on the 22nd of December, 1841, Stone and his wife conveyed to John Dumbell and his heirs, as well the property devised to Mary Ann Stone for life, as also that devised to Lucy Atkins for life, to hold

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the same to Dumbell and his heirs, to the use of Mary Ann Stone for the joint lives of herself and her husband, with remainder to the survivor of them in fee.

The question is, whether, on the death of Lucy, Mary Ann Stone, as the then sole surviving daughter of the testator, took the whole of the estate originally devised to Lucy, or whether John Cook Angell, as heir-at-law of Charlotte his mother, took one moiety of it. And this depends upon the construction to be put upon the word "*survivor*" as occurring in the proviso: if it is to be construed according to its natural meaning, certainly Mary Ann is entitled to the whole, for she alone survived Lucy; if it means "*other*," then John Cook Angell, as heir-at-law of his mother Charlotte, is entitled to one moiety.

We are of opinion, that in this case there is nothing to justify us in giving to the word "*survivor*" any other than its natural meaning. Even admitting that there are cases in which the Courts have taken upon themselves to say that by the words "*survivors or survivor*" the testator must have meant "*others or other*," though there has been nothing to warrant such a construction beyond the strong probability that the testator may so have intended, yet it is also certain that the almost uniform current of authority on this subject for above half a century has run in an opposite direction; and this on very sound and reasonable principles. It may be, that by a rigid adherence to the ordinary meaning of the testator's words, the Courts may sometimes disappoint the intention which he really had, and which, by the words in question, he meant to express; but this is a misfortune against which it is impossible to guard; it arises, not from any defect of the law, but from the neglect of the testator in not using language calculated to express his real meaning. The law admits of no will except a will reduced into writing, and signed by the testator; and we are violating the law whenever we receive, as a testator's will, not what he has written, but what we conjecture he meant

to have written. Of course, this observation does not apply to a case, where, on the face of the will, it appears that any word of known import is used in some *other than* its definite sense, differing from its ordinary sense. We are bound, then, to give such word the sense in which it has been used, in the same way as if the testator had in terms said he intended so to use it. It is impossible to lay down any general rule beforehand, defining what will in each case be sufficient to enable a Court to say, from matter apparent on the face of the will, that the testator is using any word not according to its ordinary meaning. It is sufficient for us to say, that there must be something beyond the mere probability, however strong, that the testator was not aware of the precise effect of the language he has used. In this case there is nothing to shew to us that the word "survivor" was used in any other than its ordinary sense, and therefore we must give to it its ordinary meaning, and hold that the property given to Lucy for her life, on her death, vested absolutely in Mary Ann in fee.

On the same principle precisely, we must hold, that under no possible contingency can John Cook Angell become entitled to any interest in the property given to Mary Ann Stone for her life.

By the fourth question put to us, we are requested to state whether Stone and his wife, or either of them, have now any and what estate in possession in the property devised to Mrs. Stone for her life. On this part of the case, some arguments were addressed to the Court as to what was the effect of the deed of December 22, 1841, on the contingent remainders in fee expectant on the life-estate given to Mrs. Stone; but the question proposed to us is only as to whether Mr. and Mrs. Stone have now any and what estate in possession in this property; and it is perfectly clear, under the operation of the will and deed, that Mr. Stone, in right of his wife, has an estate in possession during the joint lives of himself and his wife.

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On these principles we shall certify our opinion to Vice-Chancellor *Knight Bruce*.

A certificate in conformity with the above opinion was accordingly sent.

Jan. 20.

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A declaration contained a count for money paid, together with a count which, in substance, stated, that, in consideration that the plaintiff, at the defendant's request, had contracted to sell to a third party, in the plaintiff's name, and on his credit and responsibility, certain shares in a railway company, of which the defendant was the registered holder, the defendant promised the plaintiff to deliver to him all new shares allotted in respect of such shares, and to indemnify him from all loss which might arise by reason of the

THIS was a motion for a rule to shew cause why the first or second counts of the declaration in this case should not be struck out at the cost of the plaintiff, on the ground that both those counts were founded on the same subject-matter of complaint, unless a judge at chambers, upon reference had to him, should allow the counts to stand under the conditions of the rule of Hil. Term, 4 Will. 4, r. 6, 7.

The first count stated, that before and at the time of the commencement of the suit, and before and at the time of making the promise thereafter mentioned, and thence afterwards, to wit, hitherto, the defendant was lawfully possessed and the registered holder of divers, to wit, fifty shares of and in a certain railway company, that is to say, the Leeds and Bradford Railway Company, being a company mentioned in and incorporated by a certain act of Parliament made and passed in the 8th year of the reign of her present Majesty, intituled "An Act for making a Railway from Leeds to Bradford, with a Branch to the North Midland Railway;" and thereupon, before the commencement of this suit, to wit, on &c., in consideration of the premises, and that the plaintiff, at the request and on the behalf of the defendant, had theretofore, to wit, then, in the

non-performance of the defendant's promise. It then alleged the non-delivery to the plaintiff of certain new shares allotted to the defendant; and that, by reason thereof, the plaintiff was forced and obliged to expend and did expend a large sum of money, in order to perform his said contract of sale:—*Held*, that the two counts were not in violation of the rule of H. T., 4 Will. 4, r. 5, which prohibits several counts, unless a distinct subject-matter of complaint is intended to be established in respect of each.

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name of the plaintiff, and on the personal credit and responsibility of the plaintiff, contracted to sell fifty shares of and in the said railway company, that is to say, the said fifty shares, to certain persons unknown to the defendant, and to which said persons also the defendant was unknown, at and for certain prices in that behalf, that is to say, twenty of the said shares, to wit, to one T. Hammant, at and for the price of 22*l.* 17*s.* 6*d.* for each and every of the said last-mentioned shares, and thirty of the said shares, to wit, to certain persons carrying on business under the name or firm of Messrs. Rhodes & Co., at and for the price of 23*l.* 2*s.* 6*d.* for each and every of the said last-mentioned shares, with all advantages which should accrue in respect of, or be incident to the said shares respectively, he the defendant then promised the plaintiff, amongst other things, to deliver to the plaintiff all the scrip in respect of all new shares in the said company which should be issued to and received by the defendant in respect of such new shares, which said new shares should be allotted in respect of the said fifty shares respectively, or any of them, to the defendant as the registered holder of the last-mentioned shares, or any of them, that is to say, prior to the defendant ceasing to be the registered holder thereof under or in consequence of the said contract of sale, on payment and satisfaction by the plaintiff to the defendant of all payments made by the defendant as such registered holder to the said company in respect of such new shares and such scrip, and to save harmless and indemnify the plaintiff from all loss, damage, costs, and charges, which should or might arise or happen to, or be incurred by the plaintiff for or by reason of the non-performance or non-observance or non-fulfilment by the defendant of the said contracts entered into by the plaintiff in manner aforesaid, or either of them, or any part thereof respectively. And the plaintiff in fact saith, that afterwards, and whilst the defendant continued to be, and was lawfully possessed of, and the registered holder of

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divers of the said fifty shares, and before ceasing to be such under or in consequence of the said contracts of sale, or otherwise, to wit, twenty thereof, to wit, on &c., the said railway company allotted to the defendant, as and then being such registered holder thereof, divers, to wit, twenty new shares in the said company of 50*l.* each respectively, and twenty other new shares therein of 12*l.* 10*s.* each respectively, under and subject to the payment of, to wit, 5*l.* by the hundred of the said amounts of the said several new shares so allotted, that is to say, the sum of 62*l.* 10*s.*, by the defendant to the said company, on or before the 20th day of December in the year last aforesaid; and afterwards, to wit, on &c., he the defendant having theretofore, to wit, on &c., paid to the said railway company the said 5*l.* by the hundred of the said amounts, that is to say, the said sum of 62*l.* 10*s.* in respect of the said several new shares so allotted as aforesaid, the said company thereupon then, and whilst the defendant continued such registered holder as aforesaid, issued to the defendant, and the defendant then received from the said company, twenty scrip in respect of the said twenty new shares of 50*l.* each so allotted as aforesaid, and twenty other scrip in respect of the said twenty other new shares of 12*l.* 10*s.* each, so allotted as aforesaid. And the plaintiff further saith, that the said sum of 5*l.* by the hundred, so amounting as aforesaid, and so paid as aforesaid, was the only payment made by the defendant, as such registered holder as aforesaid, to the said company in respect of such new shares aforesaid and such scrip; and that he the plaintiff hath always, from the time of the said allotting of the said new shares, been ready and willing to pay to the defendant the said sums so amounting as aforesaid, under and subject whereto the said several new shares were so allotted as aforesaid, and afterwards, and within a reasonable time after the said shares were so allotted as aforesaid, to wit, on &c., offered to the defendant to pay him the said sums so amounting as aforesaid, and then re-

quested him the defendant to deliver to him the plaintiff the said scrip in respect of the several new shares in the said company, of all which the defendant then, to wit, on &c., had notice. Nevertheless the defendant disregarded his said promise in this, to wit, that although a reasonable time from and after the said request, and also from and after the said receipt by the defendant of the said scrip, had elapsed before the commencement of this suit for the delivery of the said scrip by the defendant to the plaintiff, the defendant did not nor would, when he was so requested as aforesaid, or at any other time, deliver the said scrip, or any part thereof, to the plaintiff; by means and in consequence whereof the plaintiff was afterwards, and before the commencement of this suit, to wit, on &c., forced and obliged to expend, and did expend by reason of the said contract so made by him as aforesaid, and the said neglect of the defendant, divers large sums of money to a large amount, to wit, 710*l.* in and about the purchase of twenty other of the said new shares of 50*l.* each, and of twenty others thereof at 12*l.* 10*s.* each, in order, and for the purpose of performing the said contract so made with the said T. Hammant as aforesaid, and in and about the discharging and satisfying the loss and damage caused by the inability of the plaintiff to perform the said contract so made by him on behalf of the defendant as aforesaid, and has lost all interest, gains, and profits which he might and otherwise would have made from using the said sum of money so expended as aforesaid. And for assigning a further breach of the said promise of the defendant the plaintiff says, that, although afterwards, to wit, on &c., the plaintiff gave notice to the defendant of the last-mentioned premises, and then requested the defendant to save harmless and indemnify him the plaintiff from and against the said sums of money so laid out and expended by the plaintiff for the due performance of the said contract for sale as aforesaid, and from and against all loss and damage in respect thereof,

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yet the defendant did not nor would, when he was so requested as last aforesaid, or at any other time, indemnify and save harmless the plaintiff from the said sums of money, or any part thereof, or from all loss and damage in respect thereof, but has wholly neglected and refused so to do; by means whereof the plaintiff hath from thence hitherto lost and been deprived of the use and benefit of the said sums of money, and of divers great gains and profits, amounting, to wit, to 1000*l.*, which he might and but for the premises would have had and received in respect thereof.

The second count was an *indebitatus* count for money paid by the plaintiff for the use of the defendant.

Atherton, in support of the motion.—The two counts are founded on the same subject-matter of complaint, and are in contravention of the rule of Hilary Term, 4 Will. 4, r. 5. The special count discloses a contract, whereby, in consideration of the plaintiff having at the defendant's request contracted to sell to a third party in the plaintiff's name, and on his personal credit and responsibility, certain shares in a railway company, of which the defendant was the registered holder, the defendant promised the plaintiff to deliver to him all new shares allotted in respect of the said shares, on payment to the defendant of all payments made by him to the company in respect of such new shares, and to save harmless and indemnify the plaintiff from all loss incurred by him by reason of the non-performance of the defendant's promise. It then states in substance, the non-delivery to the plaintiff of certain new shares allotted to the defendant, and that by reason thereof the plaintiff was obliged to expend a large sum of money in the purchase of other shares for the purpose of performing his contract. *Bayliffe v. Butterworth* (a) is an authority to shew, that, under those circumstances, a special count is wholly unneces-

(a) *Ante*, p. 425.

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sary. There the defendant had employed the plaintiff, a broker at Liverpool, to sell for him twenty railway scrip shares. The plaintiff sold them to another broker at Liverpool; but, not being delivered at the proper time, the purchaser bought twenty other scrip shares in the market at an advanced price, and claimed the difference, which the plaintiff paid; and it was held, that he might recover back the money so paid under the common count for money paid. The only difference in the present case is, that the declaration alleges a contract to indemnify, followed up by a statement that the plaintiff lost the use of the money disbursed. [*Parke, B.*—How is this money paid for the use of the defendant? He has not authorised the purchase of shares on his account.] The plaintiff was under an obligation to deliver the shares, therefore he paid the money by compulsion, and in order to maintain his credit. [*Parke, B.*—The defendant does not say “purchase the shares on my account, and I will pay you again;” but he merely agrees to indemnify the plaintiff from any loss which he might sustain by the non-delivery of the new shares allotted to the defendant.]

PER CURIAM (*a*).—There ought to be no rule.

Rule refused.

(*a*) *Pollock, C. B., Parke, B., Alderson, B., and Rolfe, B.*

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Jan. 24.

THOMPSON v. UNIVERSAL SALVAGE COMPANY.

In an action against a joint-stock company upon a promissory note, the declaration stated, that the company was completely registered; that one S. P. and one C. L., then being two of the directors of the company, made their promissory note, and thereby promised, on behalf of the company, to pay to the plaintiff, or his order, 32*l.* 4*s.* 9*d.*, the balance of the plaintiff's account due from the company; which note was then signed by S. P. and C. L., and was then made by them, and in their names, and on behalf of the company, and then was and is expressed by them to be made on behalf of the company, and was then countersigned by the secretary of the company; and thereupon the company, in consideration of the premises, then promised the plaintiff to pay him the amount of the note according to the tenor and effect thereof.

ASSUMPSIT.—The declaration commenced by stating that the said company, before and at the time of the making of the promissory note thereafter mentioned, was and still is a joint-stock company, completely registered by the name of the Universal Salvage Company, and had obtained a certificate of complete registration, as required by the statute 7 & 8 Vict. c. 110.

The first count then stated, that heretofore, to wit, on the 24th of June, 1847, one Samuel Price, and one Christopher Lund, then being two of the directors of the said company, made their promissory note in writing, and thereby promised, on behalf of the said company, to pay to the plaintiff, or to his order, the sum of 32*l.* 4*s.* 9*d.*, the balance of his (the plaintiff's) account due from the said company, three months after the date of the said note, which period had elapsed before the commencement of this suit; which said promissory note was then signed by the said Samuel Price and Christopher Lund, and was then made by them, and in their names, and on behalf of the said company, and then was and is expressed by them to be made on behalf of the said company, and was then countersigned by the secretary of the said company; and thereupon, to wit, on the same day and year aforesaid, the said company, in consideration of the premises, then promised the plaintiff to pay him the amount of the said promissory note, according to the tenor and effect thereof.

General demurrer, and joinder.

The defendants' points for argument, amongst others, were, that it was not averred that the promise of the company was by virtue of any statute; that it ought to have been averred that the company made their note, and not

note according to the tenor and effect thereof:—*Held* bad on general demurrer.

that Price and Lund made their note, which the company promised to pay; that if the note were properly described as the note of Price and Lund, then, in order to make the company liable to pay such note, it ought clearly to appear to be a note made according to the provisions of the stat. 7 & 8 Vict. c. 110. That the persons who made it had no authority to bind the company by such note; and that it was not shewn that there was a deed of settlement by which the company were authorised to make promissory notes.

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Montague Smith, in support of the demurrer.—The main objection to the declaration is, that it does not appear that the note is the note of the company. [*Parke, B.*—It might have been stated that the defendants made their note. It does not appear, that by their deed of settlement the company had authority to make notes.] If the plaintiff takes upon himself to allege that the note was made in pursuance of the statute 7 & 8 Vict. c. 110, he ought to shew that all the requisites of the statute have been complied with (*a*).

[He was then stopped by the Court.]

Swann, contra.—The note is binding on the company if

(*a*) Sect. 45 enacts, “with regard to bills of exchange and promissory notes made, accepted, or indorsed on the behalf or account of any such company, so far as relates to the mode of making, accepting, or indorsing the same, and to the liability of any such company thereon, that if the directors of the company be authorised by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be)

by and in the names of two of the directors of the company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company; and that every such bill of exchange and promissory note, so made or accepted as aforesaid, shall be countersigned by the secretary or other appointed officer of the company in whose behalf the same is expressed to be made or accepted:”

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it be in the form required by the statute, although the directors may have no authority from the company. The note observes the requisites of the 45th section of the act. [*Parke*, B.—Your argument is, that the note binds the company if issued by the directors, although they had no authority from the company to issue it, provided only it be in accordance with the form required by the statute. Surely that position is untenable. *Pollock*, C. B.—There is no authority alleged, and we cannot infer it.] In the next place, the plaintiff has averred that the note was made on behalf of the company, which is followed by a promise to pay the amount of the note, which was the amount of the balance of the plaintiff's account due to him by the company. [*Parke*, B.—There is no express averment that the balance was due. To support that argument, it would be sufficient merely to state that the defendants promised to pay the amount of the note.]

PER CURIAM (*a*).—The plaintiff may have a month's time to amend, otherwise there will be

Judgment for the defendants.

(*a*) *Pollock*, C. B., *Parks*, B., *Alderson*, B., and *Platt*, B.

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HARRIES v. LAWRENCE.

Jan. 27.

CHARNOCK had obtained a rule calling on the plaintiff to shew cause why, on payment of £5, the amount of the verdict recovered in this case, all further proceedings should not be stayed, or why the judgment should not be entered up for the said sum of £5 only, without costs, or why the plaintiff should not bring the *postea* into court, and file the plea roll, so that the defendant might enter a suggestion thereon to deprive the plaintiff of costs, pursuant to the statute 9 & 10 Vict. c. 95, s. 129, for the more easy recovery of small debts and demands in England.

It appeared from the affidavits, that the action was brought to recover 44*l.* 6*s.*, for a breach of covenant in not repairing a house situate in the county of Middlesex, and that both plaintiff and defendant resided within the jurisdiction of the county court of Middlesex, established under the 9 & 10 Vict. c. 95. The present action was commenced after the passing of that statute, but before the Middlesex county court was constituted by order of the Queen in Council, under the provisions of the 1st section. The cause had been tried before *Pollock*, C. B., and a verdict found for the plaintiff, damages £5.

The 129th section of the 9 & 10 Vict. c. 95, which deprives of costs parties who, after the passing of that act, sue in the superior courts for causes for which a plaint might have been entered in the county court, does not apply to an action commenced in a superior court after the passing of that act, but before the county court was established by order in Council.

Crowder shewed cause.—The proper construction of the 129th section of the 9 & 10 Vict. c. 95, is manifestly contrary to that put upon it by the other side. That section enacts, “that if any action shall be commenced after the passing of this act in any of her Majesty’s superior courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than £20, if the said action is founded on contract, or less than £5 if it be founded on tort, the plaintiff shall have judgment to recover such

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sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless, in either case, the judge, who shall try the cause, shall certify on the back of the record, that the action was fit to be brought in such superior court." When this action was commenced there was not any court holden under that act, in which a plaint could have been entered.

Charnock, in support of the rule.—The 129th section expressly prohibits the plaintiff from recovering costs, if, "*after the passing of that act*," he shall sue in the superior court for a matter within the jurisdiction of the county court. The act of Parliament took effect from the day it received the royal assent (*a*), and the plaintiff ought not afterwards to have issued his writ, but should have waited until the county court was established.

PER CURIAM (*b*).—The rule must be discharged, with costs. At the time when this action was commenced, there was not any court holden under the statute in which the plaintiff could have sued.

Rule discharged, with costs.

(*a*) 33 Geo. 3, c. 13.

(*b*) *Pollock*, C. B., *Parks*, B., *Alderson*, B., and *Platt*, B.

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PARKER v. CROUCH.

Jan. 29.

BOVILL had obtained a rule calling on the plaintiff to shew cause why he should not bring the *postea* into Court, and file the plea roll, in order to enable the defendant to enter a suggestion thereon, to deprive the plaintiff of costs under the provisions of the Small Debts Act, 9 & 10 Vict. c. 95, s. 129.

The 129th section of the 9 & 10 Vict. c. 95, which deprives of costs parties who sue in the superior courts for causes for which plaints might have been entered in the county court, does not apply to an action commenced in the superior court after the publication of an order in Council establishing the county court, but before the appointment of either judge or clerk.

It appeared from the affidavits, that, by two orders in Council, published in the London Gazette, it was ordered, that on the 15th of March, 1847, the act should be put in force in every county throughout England and Wales. The present action was commenced on the 25th of March, 1847, to recover damages for a trespass in breaking and entering the plaintiff's dwelling house, situate at Wimbledon, in the county of Surrey, and within the jurisdiction of the Kingston County Court. At the time the action was commenced, no judge or clerk of that county court had been appointed. The cause was tried at the Surrey Summer Assizes on the 9th of August, 1847, when a verdict was found for the plaintiff, with 40*s.* damages, and the learned judge refused to certify that the action was fit to be brought in the superior court.

Petersdorff appeared to shew cause; but the Court called on

Bovill to support the rule.—The statute does not constitute any new court, but only enlarges the jurisdiction of the old county court; until a new judge is appointed under the statute, the sheriff remains judge of the court. That appears from the preamble of the act, which recites, that “the county court is a court of ancient jurisdiction, having cognizance of all pleas of personal actions to any amount, by virtue of a writ of justices issued in that behalf; and that the proceedings in the county courts are dilatory and

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expensive, and that it is expedient to alter and regulate the manner of proceeding in the said courts for the recovery of small debts and demands." [Pollock, C. B.—The 59th section requires the clerk of the court to enter plaints in writing in a book to be kept for that purpose in his office. Parke, B.—How could this plaintiff have entered his plaint when there was no clerk to receive it?] The words in the 129th section, "for which a plaint might have been entered in any court holden under this act," are descriptive, not of the act of entering the plaint, but of the cause of action in which the plaint may be entered. [Parke, B.—The case of *Harries v. Lawrence* (a) determines this point. The 129th section deprives of costs a party who sues in the superior court for a cause in respect of which "a plaint might have been entered in any court holden under that act." That means a court which has jurisdiction under the act, which was not the case here. The enactment is by way of punishment to a person who has the option of suing in the county court, but nevertheless sues in the superior court. Here the action was commenced before there was any county court in which the plaint could be entered, for it was impossible to do so until a clerk was appointed. The plaintiff therefore had no option but to sue in the superior court.]

PER CURIAM (b).—The rule must be discharged with costs.

(a) *Ante*, p. 697.

(b) *Pollock*, C. B., *Parke*, B., *Alderson*, B., *Platt*, B.

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GILES v. HUTT and Others.

Jan. 29.

IN this case *Rolfe*, B., had made an order allowing the defendants to plead several matters to a declaration in *auditâ querelâ*. A rule nisi having been obtained to rescind that order,

An *auditâ querelâ* is an "action or suit" within the 4 Anne, c. 16, s. 4, and a defendant may plead several matters thereto.

Peacock shewed cause.—The 4 Anne, c. 16, s. 4, enacts, that "it shall and may be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any court of record, with the leave of the same court, to plead as many matters thereto as he shall think necessary for his defence." An *auditâ querelâ* is an "action or suit" within the meaning of that enactment. The authorities are collected in a note to the case of *Turner v. Davies* (a), where it is said, "an *auditâ querelâ* is an equitable action which lies for a person who either is in execution, or in danger of being so, upon a judgment, statute merchant, statute staple, or recognizance, when he has matter to shew that such execution ought not to have issued, or should not issue against him." Again (b), "an *auditâ querelâ* is a commission to the judges to examine the cause (Cro. Jac. 29, *Oguel v. Randol*), and is in the nature of a trespass; therefore, where it was brought against two executors, and one only appeared and the other made default, he who appeared was awarded to answer alone: and damages are given if the execution be without right: 2 H. 4, 17 b; Bro. Damages, 38; Executors, 42." The nature of an *auditâ querelâ* is also shewn in the judgment of the Court in *Leake v. Dawes* (c), where *Barchley*, J., said, "that if a man be seised of Blackacre and Whiteacre, and acknowledgeth a statute, and afterwards makes a lease for years of Whiteacre, the remainder over in fee, and then the conusee purchase

(a) 2 Wms. Saund. 147, n.(1). (b) 2 Wms. Saund. 148 a.

(c) March, 71.

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Blackacre, and extendeth the land of the lessee for years; he held, that he in remainder should have an auditâ querelâ or a scire facias for the damnification which came to his interest. And he held, that he who had but an interesse termini should have an auditâ querelâ; that one jointly only might have an auditâ querelâ; and that the death of one of them should not abate the writ. And he held, that cestui que use before the statute might have an auditâ querelâ: all which proves it to be but an equitable action, upon which the law doth not look with so strict an eye as upon other actions." In Blackstone's Commentaries (a), an auditâ querelâ is stated to be "in the nature of a bill in equity, to be relieved against the oppression of the plaintiff;" but it bears more resemblance to an action, since damages are recoverable. In the case of *Oguel v. Randol* (b), *Tanfield*, Serjt., in argument said, that "it was ruled in *Malyns v. Hawkins* (c), that it was a good surmise in an auditâ querelâ to avoid execution of a judgment, that after judgment he had paid the entire sum; for it is not only a suit in law, but in equity also." In *Malyns v. Hawkins* (c), it was held that the writ abated by the death of the defendant. If the plaintiff be nonsuited, he may have a new writ of auditâ querelâ, but not a supersedeas: Vin. Abr. tit. "Auditâ Querelâ," (L.4); Fitz.Nat.Brev.104, O. No doubt several matters may be pleaded to a scire facias, for it is considered in law as an action, and in the nature of a new original: 2 Wms. Saund. 71 a, n. 4. That writ bears a near resemblance to an auditâ querelâ, the object of the former being to enforce a judgment, of the latter to give relief from it. The seventh section of the statute of Anne points out the cases to which the fourth section does not apply. And as the Queen is not bound by that statute, the defendant cannot plead double in an information of intrusion in quare impedit where the Queen is a party, or in scire facias for a bond

(a) Vol. III. p. 406. (b) Cro. Jac. 29. (c) Cro. Eliz. 634.

debt to the Queen: nor could he plead double, till the stat. 32 Geo. 3, c. 58, to an information in the nature of a quo warranto: 1 Tidd, Prac. 655; *Attorney-General v. Allgood* (a). Those are the only exceptions. *Shaw v. Lord Alvanley* (b) was the case of an application to the Court for leave to plead several matters to a scire facias. In *Nathan v. Giles* (c), several pleas were pleaded to a declaration in auditâ querelâ.

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G. Pollock, in support of the rule.—In the case of *Nathan v. Giles* (c), the present objection was not taken. [*Pollock*, C. B.—That case can hardly be said to have passed sub silentio: it excited a great deal of attention at the time.] Even admitting that an auditâ querelâ is an “action or suit,” the statute of Anne does not apply to every description of action or suit. The Uniformity of Process Act, 2 Will. 4, c. 39, requires all personal actions to be commenced by writ of summons; but though an auditâ querelâ is a personal action, it is not so within the meaning of that statute. The object of the statute of Anne was to enable persons sued effectually to defend themselves *against demands*. The words, “any defendant or plaintiff in replevin,” shew that the benefit of the statute is limited to persons strictly in the situation of defendants. The plaintiff in an auditâ querelâ does not seek to enforce any demand; the defendant is in reality a plaintiff; and to allow several pleas would be equivalent to allowing several replications; for the subject matter of the auditâ querelâ is in the nature of a plea, and the pleas are in effect replications. If the ground for relief stated in the auditâ querelâ had arisen earlier, so that the present plaintiff could have pleaded it in the former action puis darrein continuance, the now defendant could only have replied one single matter. [*Pollock*, C. B.—There is

(a) Parker, 1. (b) 9 Moore, 694; 2 Bing. 325.
(c) 5 Taunt. 558.

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much weight in the argument that a scire facias and auditâ querelâ are correlative]. It appears from the case of *Phillipson v. Tempest* (a), that *Wightman*, J., at one time doubted whether proceedings by scire facias were within the statute of Anne. A declaration in auditâ querelâ ought to comprehend only one gravamen: Com. Dig. tit. "Auditâ Querelâ," (E 6); 2 Sell. Prac. 257; *Forrest v. Ballard* (b); *Puttenham v. Puttenham* (c); Fitz. Nat. Brev. 104, R. An auditâ querelâ differs from a scire facias in this, that the former is a remedy to which a defendant alone can resort, as observed by *Parke*, B., in *Aldridge v. Buller* (d): it is "auditâ querelâ defendantis." No damages or costs can be given to a plaintiff in an auditâ querelâ: *Gascoigne v. Whalley* (e); 2 Sell. Prac. 257.

POLLOCK, C. B.—This rule must be discharged. The statute of Anne enacts, that the defendant in any "action or suit" may plead several matters; and the question is, whether a proceeding by auditâ querelâ is an "action or suit." It may not be an action, but it cannot be denied that it is a suit. In several of the authorities cited it is distinctly called "a suit;" and in some "an action." Surely it is as much "a suit" as a scire facias; and though, in the case of *Phillipson v. Tempest* (a), my brother *Wightman* at first doubted whether such a proceeding was within the statute of Anne, yet numerous cases have lately occurred in relation to joint stock companies, in which the modern practice has been to allow several pleas in scire facias. There being, then, some cases in which an auditâ querelâ has been treated as an "action or suit," and there being also an analogy between that proceeding and a scire facias, there is still further a direct authority in point, namely, the case

(a) 1 Dowl. & L. 209.

(b) Cro. Eliz. 809.

(c) Dyer, 297 b.

(d) 2 M. & W. 413.

(e) Dyer, 193 b.

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of *Nathan v. Giles* (a), which excited a deal of attention, and was made the subject of much discussion in Westminster Hall. Unless the matter be such that we are bound to refuse a double pleading, I think we ought to grant it. It may be inconvenient, but it is certainly just, that a party should have an opportunity of stating every point of defence on the record.

PARKE, B.—I am of the same opinion. It is reasonable that the defendant should be allowed the privilege of pleading double, unless we are bound by some case to the contrary; and there is no decision which prevents us from holding that an *auditâ querelâ* is a suit within the statute of Anne.

ALDERSON, B.—The form of the writ shews that the party who sues it out is a plaintiff. It commands us, having heard the *complaint* of George Giles, to cause full and speedy justice to be done. If, therefore, the party who comes in the ordinary way of a person who sues out a writ and complains, is a plaintiff, the person against whom the writ is issued, and who is called upon to answer, must be a defendant. Then the statute says, that any defendant in any action or suit may plead several matters. It seems to me that the case falls within the very words of the statute.

PLATT, B.—The words of the statute are very plain. It is clear that a defendant in *scire facias* may plead several matters. I cannot distinguish an *auditâ querelâ* from a *scire facias*; indeed, in many particulars they are exceedingly alike. For instance, a defendant in *scire facias* cannot plead in bar of the execution any matter which he might have pleaded in bar of the action. So, in *auditâ querelâ*, a defendant cannot set up any matter in discharge which he

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has omitted to plead to the original action. I think the one is as much a "suit" as the other; and that the defendant in this case ought to be allowed to plead several matters.

Rule discharged.

Jan. 25. GOODCHILD v. LEADHAM and FERNYHOUGH, Executors of ALLEN, deceased.

In an action against two executors, the Court refused, after plea, to amend the writ of summons, by adding the name of another executor, although the Statute of Limitations had run since the commencement of the suit. *Quære*, if the amendment would have been allowed before declaration or plea.

In order to save the Statute of Limitations, the Court will amend writs of summons in all cases where an amendment could have been made under the old process.

ON the 27th of September, 1847, a writ of summons in an action on promises was sued out by the plaintiff against the defendants, as executors of Allen, who died on the 28th of June in that year. The defendants having appeared, the plaintiff declared on the 15th of November for goods sold and delivered. On the 26th, the defendants pleaded to part of the declaration *ne unques executors* and *plene administravit*; and to the residue, *non assumptit*. The plaintiff afterwards discovered that Mrs. Allen, the widow of the testator, was co-executrix with the defendants; and that, on the 21st of October, she alone had obtained probate of the will, leave being reserved for the defendants to come in and prove. The last item in the account bore date the 29th of September, 1841; consequently, a fresh action would have been barred by the Statute of Limitations. A summons was taken out at Chambers to amend the writ; and, on the 23rd of December, *Alderson*, B., made an order, that, on payment of costs, the plaintiff should be at liberty to amend the writ of summons and all subsequent proceedings, by adding the name of the co-executrix as a defendant; the defendants to have until the fourth day of Hilary Term to plead *de novo*, with liberty to the parties to apply to the Court. A rule having been obtained to rescind this order,

Martin shewed cause.—The case falls within the general rule as to amending writs. Before the Uniformity of Pro-

cess Act, a special capias was amended by altering the name of a defendant, in order that application might be made for a new original, the object being to fix the bail: *Carr v. Shaw* (a). So, in *Rutherford v. Mein* (b), a special capias was amended by inserting the Christian names of two of the defendants. [*Parke, B.*—The difficulty is in adding a defendant.] It is true, that, in *Roberts v. Bate* (c), the Court of Queen's Bench refused to amend a writ of summons by adding the name of a defendant; but in that case the non-joinder had been pleaded in abatement. The judgment of Lord Denman, C. J., and Patteson, J., in that case, seems at variance with the more recent decisions in this Court. In *Brown v. Fullerton* (d), the plaintiffs, assignees of a bankrupt, were allowed to amend the writ of summons, by adding the name of the official assignee as a plaintiff, in order to save the Statute of Limitations. Also, in an action by the assignees of a bankrupt against the public officers of a banking company, this Court, for the same reason, allowed the writ to be amended by stating the character of the plaintiffs and defendants: *Christie v. Bell* (e). The amendment will work no hardship, as the defendants merely represent the estate of the testator.

Petersdorff, in support of the rule.—Neither the Court nor a judge has any jurisdiction to compel a stranger to the suit to come in and be made a party. It is important with reference to the distribution of assets, that the co-executrix should have been served with the writ. Suppose the two executors named in the writ had made a voluntary payment to another creditor after this action was commenced, the effect of adding the co-executrix as a defendant would be to render her guilty of a devastavit, although she had no notice of the proceedings. There is no instance in the

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(a) 7 T. R. 299.

(d) 13 M. & W. 556.

(b) 2 Smith, 392.

(e) 16 M. & W. 669.

(c) 6 A. & E. 778.

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books in which the Courts have allowed a writ to be amended in order to introduce a new party as defendant. To do so would be to overrule *Roberts v. Bate* (a). [Parke, B.—The reason assigned for the amendment in *Carr v. Shaw* (b) is not very satisfactory. In the case of *Rutherford v. Mein* (c), the amendment must have been before declaration. There is a difficulty in seeing how this amendment could have been made before the Uniformity of Process Act. After that act passed, there was a meeting of the judges for the purpose of considering whether amendments should be allowed in the same way as under the old process. My brother Alderson and I thought that the statute made no difference, but we were in a minority. In *Roberts v. Bate* (a), my brother Patteson says, the judges resolved not to amend under the new process, and he refers to what I said in *Lakin v. Watson* (d). The resolution of the judges is also correctly stated by Taunton, J., in *Hodgkinson v. Hodgkinson* (e). We soon found the inconvenience of the rule, and in this Court determined to amend in all cases where the penalty would be the loss of the debt by reason of the Statute of Limitations. It appears from the case of *Roberts v. Bate* (a) that the Court of Queen's Bench has not acted on the same rule. Our practice is to allow amendments for the purpose of saving the statute, in all cases where they could have been made under the old process. Then, could this amendment have been made under the old system? There is great difference between adding a plaintiff and a defendant. In the case of the former it is done with his consent, but with respect to the latter you must undo all that has been done, and proceed as if it were a new action.] If this amendment be refused, the plaintiff will not altogether lose his remedy, for it exists against the two executors, they not having pleaded in abatement the nonjoinder of the third.

(a) 6 A. & E. 778.

(b) 7 T. R. 299.

(c) 2 Smith, 302.

(d) 2 C. & M. 685; 4 Tyr. 839.

(e) 1 A. & E. 533.

POLLOCK, C. B.—The rule ought to be absolute. This amendment, as it seems to me, could not have been made before the Uniformity of Process Act, and I am not aware of any instance in which we have gone further since the alteration made by that statute. The established practice of the Court with reference to amendments is this, that whatever could have been done before the Uniformity of Process Act will be done now. As this amendment would not have been allowed under the old system, that is a sufficient reason for saying that it ought not to be allowed now. There is very great difference between adding a plaintiff, who comes before the Court and says that he is willing to be joined, and adding a defendant who is not before the Court, and over whom neither the judge at chambers nor we have any control.

PARKE, B.—The practice of the Court is settled by the cases of *Brown v. Fullerton* and *Christie v. Bell*. It must not, however, be taken that all the judges were consulted previously to those decisions. The matter underwent great discussion, and was not finally settled, though we laid down a rule in this Court different from that on which the majority of the judges were disposed to act. We agreed to abide by that rule, and not to amend process except in two cases, that is, where the penalty of the blunder would be so great as to amount to a loss of the entire debt, and where the writ by mistake varied from the præcipe. With those two exceptions, we adhere to the general rule: We are then to say whether this case comes within the rule laid down by us. I agree with the Lord Chief Baron that we should do all that could have been done under the old practice; but, to say the least of it, I have very great doubt whether this amendment could have been made under the old process. In the case of *Rutherford v. Mein*, the amendment was evidently made at an earlier stage of the proceedings; but where matters have gone so far as here, there is no precedent of such

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an amendment. There is great inconvenience in all cases in inserting an additional defendant; it is not like adding a new plaintiff, for that is always done with his consent.

ALDERSON, B.—I am glad that I raised this question for the opinion of the Court, as we shall now be able to come to some definite rule on the subject. I agree that where the Statute of Limitations applies, we ought to make the same amendments as the Courts did under the old process. That being so, we ought to consider what discretion the Courts would have exercised before the Uniformity of Process Act. I think that under the old practice this amendment would not have been allowed. It might have been different if the application had been made at an earlier stage of the proceedings, as in the case of *Carr v. Shaw*. But we must exercise the same discretion as our predecessors, and only allow amendments in cases where they do not produce any great alteration in the proceedings. Here the amendment would disturb the whole proceedings in the suit. Besides, the case does not come within the general rule, by which amendments to save the Statute of Limitations are only allowed where the plaintiff would otherwise be deprived of his remedy. In this case the plaintiff is not deprived of his remedy, except as against the co-executrix; he may still pursue it against the other two.

PLATT, B.—I am of the same opinion. The question is, whether the Court will alter the ordinary course of practice for the purpose of introducing a new defendant on the record, and depriving the parties sued of their right under the Statute of Limitations. That question did not arise in *Brown v. Fullerton*, where the writ was amended by adding the name of the official assignee, because in that case there was the same defendant on the record, and there was no laches in the plaintiff, who sued for a debt due to the bank-

rupt's estate. So, in the case of *Carr v. Shaw*, where the name of the plaintiff was altered, the parties to the suit were the same. But here the Court is asked to add a new defendant after the Statute of Limitations has run; to do so would be to repeal the statute.

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Rule absolute.

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COVENANT.—The declaration, which was dated the 18th December, A.D. 1846, commenced by stating, that the defendant had been summoned to answer the plaintiff and one R. Ratcliffe, by virtue of a writ issued on the 21st March, A.D. 1843, at the suit of the plaintiff and R. Ratcliffe, which said R. Ratcliffe, after the issuing of the writ, and before this day, to wit, on the 20th October, A.D. 1844, died, and the plaintiff survived him: it then alleged, that heretofore, to wit, on the 23rd March, A.D. 1820, by a certain indenture then made between the defendant of the first part, Sarah Ratcliffe of the second part, and the plaintiff and R. Ratcliffe of the third part, (profert), after reciting that a marriage was intended to be solemnised between the defendant and Sarah Ratcliffe, the defendant did covenant, promise, and agree to and with the plaintiff and R. Ratcliffe, that he the defendant should and would, at the expiration

To a declaration in covenant, which commenced by stating that the defendant was summoned to answer the plaintiff and R., since deceased, by virtue of a writ issued on the 21st March, 1843, the defendant pleaded, in bar of the further maintenance of the action, special pleas of the Statute of Limitations, alleging that the first writ with which the defendant was served was a writ of pluries summons,

dated 21st October, 1846, and that such writ was not issued within one calendar month next after the expiration of any preceding writ of summons, and that the cause of action did not accrue within twenty years next before the date and issuing of the said pluries writ of summons:—*Held* bad on special demurrer; first, as an argumentative denial that the cause of action accrued more than twenty years before the commencement of the suit; secondly, as not being properly pleaded in bar of the *further maintenance* of the action.

Notwithstanding the 10th section of the Uniformity of Process Act, 2 Will. 4, c. 39, requires a particular mode of issuing and continuing writs, in order to prevent the operation of any Statute of Limitations, a plea of such statute must, in all actions, be in the general form, that the cause of action did not accrue within — years next before the commencement of the suit; and if the plaintiff replies that the cause of action did accrue within the limited time, he must shew by a proper record that all the formalities required by the 10th section have been complied with.

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of three years from the time of the solemnisation of the said intended marriage, pay unto the plaintiff and R. Ratcliffe the sum of £1000. Averment, that after the making of the said indenture, to wit, on the 25th March, A.D. 1830, the said intended marriage was duly solemnised, and that the term of three years from the solemnisation thereof expired long before the commencement of this suit: Breach, non-payment.

First plea.—That the plaintiff ought not further to maintain his action; because he (the defendant) says, that the first and only writ with which the defendant has been served in this action, and according to the exigency of which said writ the defendant, after he had been so served, to wit, on the 1st day of December, A.D. 1846, entered an appearance in this action, was a certain writ of pluries summons sued and prosecuted by the plaintiff H. Higgs, out of the Court of our lady the Queen before the Barons of her Exchequer at Westminster, on and bearing date the 21st October, A.D. 1846. And the defendant further says, that the said writ of pluries summons was not issued within one calendar month next after the expiration of any preceding writ of summons in this action, including the day of such expiration; and that no proceedings to or towards outlawry have been had upon any of the writs in this action; and that the cause of action in the declaration mentioned did not accrue at any time within twenty years next before the date and issuing of the said writ of pluries summons in this plea mentioned to have been issued on and bearing date the 21st October, A.D. 1846, and with which the defendant was served as aforesaid; and that the said last-mentioned writ was issued more than ten years next after the end of the session of Parliament holden in the third and fourth years of the reign of his late Majesty King William the Fourth. And this the defendant is ready to verify: wherefore he prays judgment if the plaintiff ought further to maintain his said action.

Second plea.—That the plaintiff ought not further to maintain his action; because the defendant says that the first

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and only writ with which the defendant has been served in this action, and according to the exigency of which said writ the defendant, after he had been so served, to wit, on the 1st December, A.D. 1846, entered an appearance in this action, was a certain writ of pluries summons sued and prosecuted by the plaintiff H. Higgs, out of the Court of our lady the Queen before the Barons of her Exchequer at Westminster in this present action, on and bearing date the 21st October, A.D. 1846. And the defendant further says, that the said last-mentioned writ of pluries summons was issued in continuation of a certain other writ of pluries summons sued and prosecuted by the plaintiff H. Higgs, out of the said court in the present action, on and bearing date the 3rd August, A.D. 1846. (The plea then stated in similar terms the several writs of pluries summons issued in continuation of previous writs, namely, writs issued by the plaintiff H. Higgs, on and bearing date the 28th March, A.D. 1846, the 3rd Nov. A.D. 1845, and the 24th June, A.D. 1845, and similar writs issued by the plaintiff H. Higgs and R. Ratcliffe, on and bearing date 3rd February, A.D. 1845, the 17th September, A.D. 1844, the 3rd May, A.D. 1844, the 30th December, A.D. 1843). And the last-mentioned writ of pluries summons was issued in continuation of a certain writ of alias summons sued and prosecuted by the said H. Higgs and R. Ratcliffe out of the same court in this present action, on and bearing date the 7th August, A.D. 1843; and that the last-mentioned writ of alias summons was issued in continuation of the said original writ of summons in the declaration mentioned. And the defendant further saith, that the writ of pluries summons above mentioned to have been issued on and bearing date the 28th March, A.D. 1846, was not entered of record within one calendar month next after the expiration thereof, including the day of such expiration, according to the form of the statute in such case made and provided; and that no proceedings towards outlawry have been had upon any of the said writs;

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and that the cause of action in the declaration mentioned did not accrue at any time within twenty years next before the date and issuing of the writ of pluries summons above mentioned to have been issued on and bearing date the 3rd August, A.D. 1846, or before the date and issuing of the said writ of summons above mentioned to have been issued on and bearing date the 21st October, A.D. 1846, and with which the defendant was served as aforesaid; and that the said last-mentioned writs were issued more than ten years next after the end of the session of Parliament holden in the third and fourth years of the reign of his late Majesty King William the Fourth. And this the defendant is ready to verify: wherefore he prays judgment if the plaintiff ought further to maintain his action.

Special demurrer to the first plea, assigning for causes, (amongst others), that the plea is bad as being argumentative, and as stating evidence, inasmuch as it is nowhere directly and affirmatively alleged that the issuing of the said pluries writ of summons, dated the 21st October, A.D. 1846, and with which the defendant was served, was the commencement of this suit, or that the cause of action did not accrue within twenty years next before the commencement of the suit; but certain alleged facts are relied on by way of argument and inference to shew that such writ of pluries summons ought to be considered as in legal effect the commencement of this suit: also, that if it be intended as a plea that the cause of action did not accrue within twenty years next before the commencement of the suit, it is repugnant and inconsistent, inasmuch as it is pleaded in bar of the further maintenance of the action, and then by implication admits, that, at the commencement of the suit, there was a good and sufficient cause of action.

There was a similar demurrer to the second plea.
Joinder in demurrer.

Cowling argued in support of the demurrers, in last

Michaelmas Term (November 17).—The pleas are bad on the grounds assigned. They are founded on the stat. 3 & 4 Will. 4, c. 42, s. 3 (a), which limits the time for bringing actions on specialties. The language of that section is similar to that of the 21 Jac. 1, c. 16, s. 3 (b), so that the same

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(a) Enacting, "That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognisance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or scire facias upon recognisance, within ten years after the end of this present session, or within twenty years after the cause of such action or suit, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present ses-

sion, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

(b) Enacting, "That all actions of trespass quare clausum fregit, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle; all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants; all actions of debt grounded upon any lending or contract, without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; (that is to say), the said actions upon the case, (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass quare clausum fregit, within three years

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principle of pleading will apply to specialties as to simple contract debts. It will perhaps be argued, that these pleas are good by virtue of the 2 Will. 4, c. 39, s. 10; but in order to ascertain the effect of that enactment, it is necessary to advert to the law respecting limitations at the time that statute passed. In proceedings by original, if the defendant sought to avail himself of the Statute of Limitations, he merely pleaded that the cause of action did not accrue within six years next before the commencement of the suit. When the action was commenced by bill, the defendant might either have pleaded in the same way, or that the cause of action did not accrue within six years next before the exhibiting of the bill. In the former case, the plaintiff, by his replication, merely traversed the plea, and gave the process in evidence to shew the true commencement of the suit; but if the defendant pleaded in the latter mode, then the plaintiff, who had his option whether he would treat the process or the exhibiting of the bill as the commencement of the suit, if he intended to adopt the process, was bound to reply it with continuances: 2 Wms. Saund. 63 *g*, n. (o), *Beardmore v. Rattenbury* (a), *Taylor v. Gregory* (b), *Dickinson v. Teague* (c). That, however, was the only case in which a special replication was necessary. Before the Uniformity of Process Act, if a plaintiff sued out a writ and got it properly returned, *Harris v. Woolford* (d), it might at any time afterwards be connected with a subse-

next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such

actions or suit, and not after; and the said actions upon the case for words, within one year after the end of this present session of Parliament, or within two years next after the words spoken, and not after."

(a) 5 B. & Ald. 452.

(b) 2 B. & Adol. 257.

(c) 1 C., M. & R. 241.

(d) 6 T. R. 617.

quent writ with which the defendant was served: *Beardmore v. Rattenbury* (a), *Taylor v. Gregory* (b). The 10th section of the 2 Will 4, c. 39, was intended to obviate that mischief. It enacts, "that no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of summons and *capias* may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon, or served therewith: Provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon, or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ" &c. That enactment makes no alteration in the mode of pleading, but merely points to the evidence necessary to defeat the Statute of Limitations. The term "available" means available in evidence. *Pratt v. Hawkins* (c) is in point: that case decided, that where a writ, issued within six years after the cause of action accrued, has not been duly continued, the defendant is not bound to plead such non-continuance specially, but may take advantage of it under the general plea, that the cause of action did not accrue within six years next before the commencement of the suit (d). The reason is, that the first writ is not the

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(a) 5 B. & Ald. 452.

(b) 2 B. & Adol. 257.

(c) 15 M. & W. 399.

(d) *Alderson, B.*, observed, that it was not stated in the report of

that case when the bill of exchange became due. *Lush*, who had argued the case, said it was a three months' bill.

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commencement of the suit with reference to the Statute of Limitations, unless it has been properly continued.—There is another objection to these pleas, viz. that they are not pleaded in bar, but against the further maintenance of the action. [*Parke, B.*—If the pleas are good, they afford an entire bar.]

Crompton, contra.—The plaintiff having declared on the writ issued in the joint names of himself and R. Ratcliffe, it became necessary for the defendant to specially state the facts, shewing that such writ was not the commencement of the suit; or, at least, he was at liberty to do so. The plaintiff was no doubt justified in alleging in his declaration, that the defendant was summoned by virtue of the writ issued on the 21st March, 1843, because in some cases, as tender or payment, the first writ is the commencement of the suit. [*Alderson, B.*—If there had been a plea of tender, together with the plea of the Statute of Limitations, then the words, “before the commencement of the suit,” would have meant two different periods. *Parke, B.*—The form prescribed by the rule of Hilary Term, 4 Will. 4, requires to be inserted in the issue the date of the first writ, not of the writ with which the defendant has been served. That is correct here; and it would have been enough to have pleaded the statute in the ordinary form, and the plaintiff in answer must have denied the fact, and in proof of the issue have put in the roll with continuances. The only question is, whether the defendant may not also plead the facts specially, as here.] The statute having given a different meaning from its ordinary sense to the term “commencement of the suit,” the defendant is entitled, upon every principle of pleading, to answer the *prima facie* case of the first writ being the commencement of the suit, by shewing specially its real commencement, viz. by the writ with which the defendant was served. If the defendant had pleaded the statute in the general form, he might have been defeated by the produc-

tion of an amended roll. These pleas are calculated to raise upon the record the question, how far a judge can amend by putting on the roll matter which the statute says shall be entered at a particular time. It is not a pleading of evidence, but a statement bringing the party within a statutory provision, which says that the cause of action shall be barred, though the suit has been commenced within twenty years, unless the first and continuing writs are sued out with certain formalities. [*Parke*, B.—When the statute says, that no first writ shall be available, it must mean that it shall not be the commencement of the suit.] There cannot be two different commencements of the suit; but under the statute there is a period after the commencement of the suit, when, in consequence of non-compliance with the required formalities, the limitation attaches. The cases of *Gregory v. Desanges* (a), *Norman v. Winter* (b), and *Nicholson v. Rowe* (c), shew that a plaintiff may still enter the old continuances on the record; and the statement in the issue is conclusive as to the date of the first writ: *Whipple v. Manley* (d). Though the defendant might have pleaded the statute in the general form, he is not bound to do so. In the case of a release, the defendant may either plead generally that the plaintiff released, or he may set out the release.

Secondly, the pleas are properly pleaded in bar of the further maintenance of the action, inasmuch as there was a good cause of action at the time the suit was commenced. [*Parke*, B.—If the defendant succeeded on these pleas, he would be entitled to the whole costs of the action.] When the first writ was sued out, the cause of action was not barred by the statute; but it became so by matter subsequent. [*Parke*, B.—The 10th section of the 2 Will. 4, c. 39, has certainly introduced a great anomaly.] Before that statute

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(a) 3 Bing. N. C. 85.
(b) 5 Bing. N. C. 279.

(c) 2 C. & M. 469.
(d) 1 M. & W. 432.

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the period of limitation ran between two limits, the time when the cause of action accrued, and the commencement of the suit; but now the statute also causes it to run after the commencement of the suit, and so the plea is matter in bar of its further maintenance. A plea in bar generally must shew that there was no cause of action at the time the suit was commenced; but in this case the defendant could not have pleaded the statute when the first writ issued.

Cowling replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B., (after stating the pleadings.)—The question in this case arises as to the proper mode of pleading the Statute of Limitations, (whether to an action of covenant, or trespass, or assumpsit), since the statute 2 Will. 4, c. 39, s. 10, requiring a particular mode of issuing and continuing writs, in order to prevent the operation of any Statute of Limitations.

In the old mode of proceeding, if the plaintiff sued by bill, he might elect to treat the filing of the bill, or the previous process by *latitat*, as the commencement of the suit; and if the defendant pleaded that the cause of action accrued more than six years *before the filing of the bill*, the plaintiff must have replied the *latitat* returned, with continuances to connect it with the bill: *Beardmore v. Rattenbury* (a). If the defendant had pleaded that the cause of action did not accrue within six years before the commencement of the suit, such a replication was neither necessary nor proper; and in proceedings in the Common Pleas, or by original writ, the plea always was in the latter form; and the replication alleged, that the cause of action accrued

(a) 5 B. & Ald. 452; 2 Saund. 2 a, n. 3 i.

within six years before the commencement of the suit; and the plaintiff must then, as a matter of evidence, have shewn the issuing and return of the writs, and proper continuances, by a copy of the record.

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As the Uniformity of Process Act puts all actions on the same footing, and makes the issuing of the writ of summons the commencement of the suit, the plea of the Statute of Limitations ought to be in the same form; and if the plaintiff replies that the cause of action did accrue within the limited time, he must shew, by a proper record, all the formalities required by the 10th section to have been complied with; just as he must have done before, where there was a plea that the cause of action did not accrue within six years &c. before the commencement of the suit.

This anomaly is introduced by this enactment, viz. that if the plaintiff has to shew the commencement of the suit in answer to a plea of tender, or for any other purpose than to defeat the bar of the Statute of Limitations, he need not prove all these requisites; *Gregory v. Desanges* (a): and in *Pratt v. Hawkins* (b), we have already held, that if this ordinary form of plea is adopted, the plaintiff must give this proof. The case, as reported, contains some inaccuracies; it was tried before Lord Chief Justice *Tindal*, not Lord *Denman*, and the roll amended was the record of continuances which the plaintiff had improperly made up; the substance, however, of the report is perfectly right. But the defendant not only may, but we think ought to, plead in this form.

The statute 3 & 4 Will. 4, c. 42, follows the language of the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, and enacts, that the action of covenant shall be "commenced and sued" within the limited time; and the proper form, which was always adopted in every action commencing otherwise than by bill, was, that the cause of action accrued, or that the

(a) 5 Bing. 85.

(b) 15 M. & W. 399.

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promise was made &c., more than the limited time before the commencement of the suit; and what was the commencement of the suit was a matter of evidence then, and is equally so now.

The objection to both these pleas, which is pointed out on special demurrer, is, that they do not contain a direct and positive allegation that the cause of action accrued twenty years before the commencement of the suit, but only an indirect and argumentative allegation that it did, because it accrued more than twenty years before the pluries summons with which the defendant was served, and that that writ could not, according to the statute 2 Will. 4, c. 39, s. 10, be connected with any anterior process, and must, therefore, be considered as the commencement of the suit.

Before the late statute for the uniformity of process, a similar plea, stating that the cause of action accrued before the service of a particular writ, and that such writ was not connected with any prior one, would, we think, be open to the same objection; it would, in truth, be a pleading of evidence: and we think the statute has made no difference in this respect.

Further, we think that the plea is not properly pleaded in bar of the further maintenance of the action. The effect of non-compliance with the exigencies of the statute is, that the suit is commenced too late, and ought altogether to be barred; and the defendant is entitled to all his costs from the commencement of the suit. It cannot be considered as properly brought up to the time of the first default, committed in not continuing properly the process; and such default puts the suit in the condition of not having been "commenced and sued" within the time prescribed.

And this objection, we think, is sufficiently pointed out by the special demurrer.

Our judgment is for the plaintiff.

Judgment for the plaintiff.

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TRESPASS.—The declaration stated, that the defendants, on divers days and times, &c., broke and entered a close of the plaintiff, situate in the township of Stretford, in the parish of Manchester, (describing the same by abutments), “and then dug, excavated, bored into, through, and along the close of the plaintiff, and then dug, excavated, and made a tunnel or hole, to wit, 50 feet long and 50 feet wide, and continued the same so made, dug, and excavated, for a long time, to wit, from thence hitherto;” and then dug, removed, and carried away divers, to wit, 10,000 cart-loads of earth and soil of and from the close of the plaintiff, and converted the same to their own use, &c.

Plea, that the close in which &c., was a certain common and public highway and street for all the liege subjects of our lady the Queen to pass and re-pass on foot, and

Trespass for breaking and entering the plaintiff's close, and making a tunnel through the same. Plea, that the close was a public highway, and that the defendants, by an act of Parliament, were incorporated for the purpose of making and maintaining a railway; that, before the passing of the said act, certain plans and sections of the railway, shew-

ing the lines and levels thereof, and also books of reference containing the names of the owners of the land through which the same was intended to pass, had been deposited with clerks of the peace; that by the said act it was enacted, that, subject to the provisions of that act and the Companies Clauses Consolidation Act and Railway Clauses Consolidation Act, it should be lawful for the defendants to make and maintain the railway in the line and upon the lands delineated and described on the said plans and in the books of reference, and to enter upon, take, and use such of the said lands as should be required for that purpose; that the said close in which &c., was delineated and described on the said plans and in the books of reference and was and is such public highway as aforesaid, whereupon the defendants at the said times, when &c., under and by virtue of the said acts, entered upon the said close in which &c., under the surface thereof, in order to make and did then so make, under the said highway, a tunnel, doing as little damage as could be, and in so doing dug, excavated, and bored the close of the plaintiff, and made the tunnel in the declaration mentioned, as they lawfully might for the cause aforesaid.—Replication, that the close was required to be purchased and permanently used for making and permanently maintaining the railway; that the plaintiff being the owner of the close for a term of years, subject to the user of the same as a public highway, did not at any time consent that the defendants might enter upon or take the close, nor did the defendants give any notice to the plaintiff to sell and convey or release the same to them, or that they required the same; nor did the defendants pay the plaintiff, or deposit in the Bank, any purchase-money or compensation for the interest of the plaintiff therein; that the defendants did not enter on the close for the purpose of merely surveying or taking levels, &c., but for the permanent using and taking the same to their own use; and at the said time when &c., and thence hitherto, have used and now permanently use the close of the plaintiff for the permanent purpose of the railway. On demurrer to the replication:—*Held*, that the plea afforded no justification, inasmuch as the defendants were bound, under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, to make compensation before entering upon the close.

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with cattle, carts, carriages, through, over, and along the same, at all times of the year, at their free will and pleasure; and that the said company, before the committing of the supposed trespasses, &c., by a certain act of Parliament made and passed in a session of Parliament held in the eighth and ninth years of the reign of her present Majesty, intituled "An Act for making a Railway to connect the Manchester and Birmingham and Liverpool and Manchester Railways, in the Parish of Manchester, and also to Altrincham, in the County of Chester, to be called the Manchester, South Junction, and Altrincham Railway," were united into a separate company, and incorporated for the purpose of making and maintaining a certain railway, together with all proper works and conveniences connected therewith, according to the provisions of the said act; and for the purposes aforesaid were incorporated by the name of "The Manchester, South Junction, and Altrincham Railway Company," and by that name constituted and made a body corporate, with perpetual succession and a common seal; and were empowered and authorised to purchase, hold, and sell lands within the restrictions in the said act contained, for the purposes of the said undertaking, without incurring any pains or forfeitures, and to have and exercise such powers and authorities as were therein given or mentioned. And whereas, before the making and passing of the said act of Parliament, certain plans and sections of the said railway, shewing the line and levels thereof, and also books of reference containing the names of the owners or reputed owners, lessees, and occupiers of the land through which the same was intended to pass, had been deposited with the respective clerks of the peace of the counties of Lancaster and Chester. And whereas, in and by the said act of Parliament it was further enacted, that, subject to the provisions in that said act, and to such of the provisions and restrictions of certain thereinbefore recited acts as were thereinbefore incorporated with that said act, that is to say,

the Companies Clauses Consolidation Act, the Lands Clauses Consolidation Act, and the Railway Clauses Consolidation Act, it should be lawful for the said company to make and maintain the said railway and works in the line and upon the lands delineated and described on the said plans and in the said books of reference, and to enter upon, take, and use such of the said lands as should be required for that purpose. And whereas the said close in which &c., was in the line delineated and described on the said plans and in the said books of reference, and was and is such public street and highway as aforesaid, and was and is within the said lands described in the said plans and mentioned in the said books of reference, and is there described as such public street and highway as aforesaid; whereupon the said company afterwards, to wit, on the days and times in the declaration mentioned, under and by virtue of the said first-mentioned act of Parliament and the said other acts incorporated therewith, and in pursuance of the powers and provisions therein contained for the purpose of constructing the said railway, entered into and under the said close in which &c., then being such public street or highway, as aforesaid, under the surface thereof, in order to make, and did then so make, under the said public street and highway a certain tunnel, such tunnel being thought proper by the said company, the said company doing as little damage as could be in the premises; and in so doing the company a little dug, excavated, bored into, through, along, and across the said close of the plaintiff, and then dug, excavated, and made the said tunnel or hole in the declaration mentioned, and continued the same, so made, dug, and excavated, for all the time in the declaration mentioned, and then dug, removed, and carried away the said earth and soil in the declaration mentioned off and from the said close of the plaintiff, and carried away and converted the same to their own use, doing no unnecessary damage to the plaintiff on the oc-

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casions aforesaid, as it was lawful for them to do for the cause aforesaid; *quæ sunt eadem*. Verification.

Replication, that the said close of the plaintiff, so dug, excavated, bored into, through, along, and across, for the making and maintaining the said tunnel as in the said plea mentioned, and the earth and soil thereof of the plaintiff, as in that plea also mentioned, at the time when &c., were and still are required to be purchased and permanently used for the purposes and under the powers of the several acts of Parliament in the said plea mentioned and specified, and other the acts of Parliament in that case made and provided, to wit, for making and permanently maintaining the said railway in the said plea mentioned; that the plaintiff, being the owner and occupier for the residue of a certain unexpired term, to wit, of 999 years, of the said close, earth, and soil thereof, subject to the user of the same as a common and public highway, over the surface thereof, as in the said plea mentioned, did not, at any time before or at or since the said time when &c., consent that the defendants should or might enter upon or take the said close of him the plaintiff, so dug, excavated, and bored as aforesaid, or the said earth and soil of the plaintiff; nor did the defendants, being the promoters of the said undertaking, to wit, the said railway, give any notice to the plaintiff, so interested in the land of the said close, and the earth and soil thereof, to sell and convey or release the same or any part thereof to them, or that they required the same, or any part thereof; nor did the defendants pay to the plaintiff, then having such interest as aforesaid in the said close, and the earth and soil thereof, or deposit in the Bank, in the manner in the said acts of Parliament mentioned, any purchase-money or compensation for the said interest of the plaintiff therein, or any part thereof; that the defendants did not enter into the said close of the plaintiff as aforesaid, or take and use the same, and convert the earth and soil thereof to their own use, as

in the said plea mentioned, for the purpose merely of surveying or taking levels of the said land or railway, or of probing or boring to ascertain the nature of the soil, or of setting out the line of the works for the said railway, but for the permanently using and taking the same to their own use; and at the same time when &c., and thence hitherto, have used and now permanently use the said close of the plaintiff, and the earth and soil thereof of him the plaintiff, for the permanent purpose of the said railway, under and by virtue of the said several acts of Parliament and the powers and provisions therein contained. Verification.

Demurrer, and joinder.

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Cooling (with whom was *Baines*) argued in support of the demurrer in Michaelmas Term (Nov. 17).—The question raised by the pleadings is, whether the defendants are trespassers in making a tunnel through the plaintiff's land without first giving him compensation. That depends upon the construction of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, and the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20. The defendants contend that they do not "permanently use" the land within the meaning of those statutes. The 8 & 9 Vict. c. 18, is intituled "An Act for consolidating into one Act certain provisions usually inserted in Acts authorising the taking of Lands for Undertakings of a public nature;" and the 18th section enacts, that, "when the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special act, or any act incorporated therewith, they are authorised to purchase or take, they shall give notice to all the parties interested in such lands, or to the parties enabled by this act to sell and convey or release the same, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking; and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made

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by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works." The 84th section, which is relied upon by the plaintiff, enacts, that "the promoters of the undertaking shall not, except by consent of the owners and occupiers, enter upon any lands which shall be required to be purchased or *permanently used* for the purposes and under the powers of this or the special act, until they shall either have paid to every party having any interest in such lands, or deposited in the Bank, in the manner therein mentioned, the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein: Provided always, that for the purpose merely of surveying and taking levels of such lands, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works, it shall be lawful for the promoters of the undertaking, after giving not less than three nor more than fourteen days' notice to the owners or occupiers thereof, to enter upon such lands without previous consent, making compensation for any damage thereby occasioned to the owners or occupiers thereof." Those clauses, however, relate only to the surface of lands; and the act contains no provision whatever respecting works underground. The 8 & 9 Vict. c. 20, which is incorporated with the former act, is applicable to the present case, and fully justifies the defendants in what they have done. The 16th section enacts, that, "subject to the provisions and restrictions in this and the special act, and any act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works: (that is to say), they may make or construct in, upon, across, under

or over any lands, or any streets, hills, valleys, roads, railroads or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference, or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as they think proper," &c. "They may do all other acts necessary for making, maintaining, altering, or repairing and using the railway: Provided always, that, in the exercise of the powers by this or the special act granted, the company shall do as little damage as can be, and shall make full satisfaction in manner herein, and in the special act, and any act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers." Although the company must make compensation to the party damaged, they are not bound to do so beforehand. The 8 & 9 Vict. c. 20, contains no clause similar to the 84th section of the 8 & 9 Vict. c. 18. Under a provision in a turnpike act, authorising trustees to enter upon and take lands and pull down houses, "making or tendering satisfaction to the owners or proprietors thereof," it has been held, that the trustees were not bound to make or tender compensation before or at the time of entering upon or taking the lands or pulling down the houses: *Lister v. Lobley* (a). [*Pollock*, C.B.—That case seems to have turned on the language of that particular statute.] The same point was decided in the case of *Peters v. Clarkson* (b), which arose under the Highway Act, 5 & 6 Will. 4, c. 50, s. 54. If, in making the excavations, the company should interfere with any mines, that case is provided for by the 77th section. [*Alderson*, B.—That section only says, that the company shall not be entitled to the mines in addition to the land.] Suppose the construction of the railway would

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(a) 7 A. & E. 124.

(b) 8 Scott's N. R. 384.

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necessarily cause a stream to deviate from a mill, the company might nevertheless proceed with the works before making compensation. [*Alderson, B.*—In that case they do not take possession of any land; but in the case of a tunnel they have an exclusive occupation.] Until the tunnel is made, it is impossible to ascertain what damage may be done.

Hoggins, contra.—By the 6th section of the 8 & 9 Vict. c. 20, the company are only enabled to execute the works mentioned in the 16th section, subject to the provisions and restrictions of the Lands Clauses Consolidation Act, one of which is that they shall make compensation before entering upon land. By the 44th section of the 8 & 9 Vict. c. 20, the compensation is to be determined in the manner provided by the Lands Clauses Consolidation Act. The legislature contemplated both a temporary and a permanent occupation of lands. The 16th section of the 8 & 9 Vict. c. 18, provides for the latter event. Then the 84th section prohibits the promoters of the undertaking from entering upon any lands which shall be required to be purchased or permanently used, until they have paid the purchase-money or compensation. That section makes no distinction between the surface and underground. [*Parke, B.*—By the 46th section of the 8 & 9 Vict. c. 20, “If the line of railway cross any turnpike road or public highway, then (except where otherwise provided by the special act) either such road shall be carried over the railway, or the railway shall be carried over such road by means of a bridge of the height and width, and with the ascent or descent, by this or the special act in that behalf provided,” &c. When the railway goes over a turnpike road, has the owner of the soil a right to insist upon the company purchasing his interest before they make the bridge?] Probably he has. The object of requiring notice of the land intended to be taken is to enable the owner to arrange about the compensation.

Cowling, in reply.—The making a tunnel is not a “taking of land” within these statutes. When the legislature speaks of the permanent use of land, the words must be understood in their ordinary sense, namely, such a use as would interrupt the enjoyment of its surface, either as a highway or otherwise. At all events, the defendants are not liable in trespass. The 53rd section of the 8 & 9 Vict. c. 20, provides, that, before roads are interfered with, others are to be substituted. The 54th section subjects the company to a penalty of £20 for every day during which a substituted road shall not be made after the existing road shall have been interrupted. By the 55th section, a party suffering special damage from the interruption of a road may recover in an action on the case. The remedy of the plaintiff is under these sections, not by action of trespass.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action of trespass, in which the plaintiff complained that the defendants had broken and entered his close, and had cut a tunnel through the same. The defendants justified under a local act of Parliament (8 & 9 Vict. c. cxi.), whereby they were incorporated, and were authorised to make a railway connecting the Manchester and Liverpool Railway with the Manchester and Birmingham Railway, subject to the provisions of the “Lands Clauses Consolidation Act” and the “Railway Clauses Consolidation Act;” and, by their plea, they averred that the close in question is a public highway, and is marked and delineated in the plan and book of reference deposited by the defendants, as part of the lands through which the intended railway was to pass; and therefore they say, that, for the purpose of making their railway, they entered into and under the said close, and made the tunnel, doing no unnecessary damage.

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The plaintiff replied, that the close in question is required to be purchased and permanently used for the purpose of the railway; and that he, the plaintiff, being entitled to the soil of the said close for a term of 999 years, subject to the public right of way over the same, the defendants entered and made the tunnel without any consent of the plaintiff, and without giving him any notice to sell and convey the same, and took the same for the purpose of permanently using it for the purpose of the railway. To this replication the defendants demur; and the question is, whether on the pleadings there is a sufficient justification; and this depends entirely on the two acts called the "*Land Clauses Consolidation Act*" and the "*Railway Clauses Consolidation Act*." The defendants say, that those acts justify them in what they have done; and this is denied by the plaintiff.

The first act, 8 & 9 Vict. c. 18, is a general act, pointing out the course to be taken by all companies incorporated under special acts of Parliament for purposes which require that they should acquire and take lands; and, without going into any detail, it is sufficient to say, that the plea certainly does not aver that the defendants have complied with the requisitions of this act. It must be taken, on the pleadings, that the tunnel has been made with a view to its permanently forming part of the railway; and if, therefore, this could not be done without first purchasing the soil taken, or, at least, paying a compensation for the permanent occupation of it, then it is clear that the defendants were not justified in committing the trespasses. But on the part of the defendants it was argued, that they are not bound to justify under the Land Clauses Consolidation Act; for what they have done is warranted by virtue of the 16th section of the subsequent act, (8 & 9 Vict. c. 20), called the Railway Clauses Consolidation Act. The defendants contend that, under this section, they are in terms authorised to make (inter alia) any tunnels, for the

purpose of their railway, which they may think expedient. The defendants do not dispute their ultimate liability to make compensation for any damage they may occasion by making the tunnel; but they contend that the quantum of damage cannot be ascertained until the tunnel is made, and that, in the meantime, they are not trespassers for making it.

We cannot, however, take this view of the case. If the company made a permanent tunnel for the railway to pass through, by virtue of the power given by the 16th section, they must do so by the express enactment in the 6th section, subject to the provisions and restrictions in the Land Clauses Consolidation Act, 8 & 9 Vict. c. 18, and one of those restrictions is, that, whether they purchase the land itself, or permanently occupy it, they must pay the compensation before entry; so that, whether the defendants acted under the first or second act, the defence is insufficient on the same ground, that they have not before entry paid the compensation due to the owner of the land through which the tunnel passes. We think, therefore, there must be

Judgment for the plaintiff.

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Jan. 27. **RYALLS v. BRAMALL and Another, Executors of JOEL BUXTON, deceased.**

A declaration against two executors on a bill of exchange accepted by their testator, stated, in the commencement, that the defendants had been summoned by virtue of a writ issued on the 14th May, 1847. The defendants pleaded in abatement, that the testator heretofore, to wit, on the 13th December, 1846, made his will, and thereby appointed the defendants and B. executors and executrix thereof; and afterwards, to wit, on the 16th December, 1846, died; and the defendants and B. afterwards, to wit, on the 23rd January, 1847, duly proved the will, and took upon them-

ASSUMPSIT against two executors, on a bill of exchange accepted by their testator, Joel Buxton. The declaration, which was dated the 29th June, A.D. 1847, commenced by stating that the defendants had been summoned to answer the plaintiff by virtue of a writ issued on the 14th May, A.D. 1847.

Plea.—And the defendants, by E. T., their attorney, pray judgment of the said writ and declaration, because they say that the said testator, heretofore, to wit, on the 13th December, A.D. 1846, made his last will and testament, and thereby constituted and appointed the defendants and one Charlotte Buxton executors and executrix thereof; and afterwards, to wit, on the 16th December, A.D. 1846, the said Joel Buxton died; and the defendants and the said Charlotte Buxton afterwards, to wit, on the 23rd January, 1847, duly proved the said will, and took upon themselves the burthen of the execution thereof, and the said Charlotte Buxton then administered divers goods and chattels which were of the said Joel Buxton at the time of his death, as executrix of the last will and testament of the said “Joel Buxton.” And the defendants bring here into court the letters testamentary of the said Joel Buxton deceased, which fully prove that the defendants and the said Char-

—selves the burthen of the execution thereof; and B. then administered divers goods and chattels which were of the testator at the time of his death, as executrix of his will. The plea being specially demurred to, on the ground that it did not shew that B. administered *before the commencement of the suit*.—*Held*, that the plea was good, for dates may be assumed to be material on demurrer, when, if truly stated, they would support the plea; and therefore the Court must intend that the administering of the assets was before the commencement of the suit, the date of the writ being stated; and it seems the Court is presumed to have the writ before them on demurrer.

Held, also, that the plea was not double, as the allegation of probate was only inducement to the averment of administration.

Though the 27 Eliz. c. 5, and 4 Anne, c. 16, do not apply to pleas in abatement, yet, at common law, duplicity in such pleas could only be taken advantage of on special demurrer.

lotte Buxton were and are executors and executrix of that will, and have the execution thereof &c. And the defendants further say, that the said Charlotte Buxton is still living, and at the time of the commencement of this suit was and still is resident within the jurisdiction of this Court, to wit, at Tytherington, in the parish of Prestbury, in the county of Chester. And this the defendants are ready to verify, wherefore, inasmuch as the said Charlotte Buxton is not named as a defendant in the said writ and declaration, the defendants pray judgment of the same writ and declaration, and that the same may be quashed, &c.

Special demurrer, assigning for causes, that it is not alleged that Charlotte Buxton proved the will of Joel Buxton, or took upon herself the burthen of the execution thereof, or that Charlotte Buxton administered the goods and chattels which were of Joel Buxton at the time of his death, as executrix of the last will and testament of Joel Buxton, before the commencement of this suit.—Joinder in demurrer.

Blackburn argued in support of the demurrer in last Michaelmas Vacation (December 8).—A different rule prevails in actions *by* and *against* executors. In the former case all must join, whether they have administered or not; in the latter it is only necessary to sue so many of the executors as have administered. It is essential, therefore, that a plea in abatement for non-joinder of a co-executor should aver that he has administered: 2 Wms. Exors. 1618; Com. Dig. tit. "Abatement" (F. 10); Plow. Com. 33, 9 Edw. 4, 12. This plea is defective, inasmuch as it does not allege that the executrix not joined administered *before the commencement of the suit*. All pleadings refer to the time they are pleaded, unless the contrary is shewn by averment. Where an executor pleads plenè administravit, and the plaintiff takes a judgment of assets quando acciderint, the scire facias on that judgment

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must pray execution of such assets only as have come to the executor's hands since the judgment: *Mara v. Quin* (a). So where, to debt on bond, the defendant pleaded non est factum, and after issue joined, and before trial, the bond, by the negligence of one of the clerks, who had it in his custody, was eaten by mice, and the labels of the seals also, the jury were charged to inquire if that was the deed of the defendant at the time of *plea pleaded*: *Nichols v. Hawood* (b). Also, where a declaration in covenant alleged in excuse of profert that the indenture, "being in the possession of the defendant, the plaintiff cannot produce the same to the Court," and the defendant pleaded that the indenture "is not in the possession of the defendant" modo et formâ, such plea was held bad, as referring to the time when pleaded, and not to the time pointed to in the declaration: *Fisher v. Ford* (c). [*Parke, B.*—That case is perfectly clear.] *Allen v. Hopkins* (d) shews that a plea of payment must state that the money was paid before action brought. It is a general rule, that every pleading shall be taken most strongly against a defendant; therefore, in trespass, if the defendant pleads a release, without saying at what time it was made, it shall be intended to be made before the trespass; so, if to a bond the defendant pleads payment, it shall be intended after the day, if he does not say otherwise: Com. Dig. tit. "Pleader," (E. 6). That rule applies à fortiori to pleas in abatement. *Tucker v. Webster* (e) decided, that a plea of the plaintiff's discharge under the Insolvent Debtors' Act must aver that the vesting order was made before the commencement of the suit. In *Faithfull v. Ashley* (f), a count alleged that the defendant *was indebted* to the plaintiff in 10*l.* for work, &c., to which the defendant pleaded that he *never was indebted* in a greater amount than 4*l.*, which he paid into court: the plaintiff replied that the defendant *was indebted*

(a) 6 T. R. 1.

(b) Dyer, 59 a.

(c) 12 A. & E. 654.

(d) 13 M. & W. 94.

(e) 10 M. & W. 371.

(f) 1 Q. B. 183.

in a greater amount than that sum; and that replication was held bad on special demurrer.—Another objection to the plea is, that it is double, inasmuch as it alleges both the grant of probate to Charlotte Buxton, and also that she administered.

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Whitehurst, contra.—This plea is framed in accordance with the precedents in use for many years. It is conceded that a plea of this kind must shew that the co-executor has administered, otherwise one of several executors, by not proving the will, might defeat the action for ever; but that is sufficiently shewn. The time to which a plea refers must depend upon the nature of the plea. A plea of a right of way has reference to the time of committing the trespass. This plea shews upon the face of it that the party not joined was in fact executrix before the commencement of the suit. There is a distinct allegation that the grant of probate to the defendants and Charlotte Buxton was one and the same act, and it is evident that there was but one joint administering of the goods. [*Platt*, B., referred to *Wankford v. Wankford* (a).] If the plea be capable of two constructions, the Court will put upon it that construction which will support it. The allegation that probate was granted on the 23rd January, 1847, is material, and if traversed must have been strictly proved. A “videlicet” will not render immaterial a date which is necessary to make the plea good.

With regard to the objection of duplicity, the allegation of the grant of probate is merely inducement to the material averment that the executrix administered. Besides, the duplicity, if any, is not pointed out as ground of special demurrer.

Blackburn, in reply.—The rule is, that a plea demurred

(a) 1 Salk. 300.

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to shall be taken most strongly against the party pleading; but after verdict the intendment is in favour of the plea. [Parke, B., referred to *Alexander v. Mawman* (a) and *Swallow v. Emberson* (b).] *Alexander v. Mawman* was under the old process, when, according to *Tucker v. Webster* (c), it would have been necessarily intended that the act of administering took place before the commencement of the suit.—With respect to the other point, it would have been clearly sufficient to have alleged that the executrix administered, without stating the grant of probate.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B., (after stating the pleadings).—The question is, whether the plea is good.

Several objections were made to it. The principal one was, that the facts mentioned in the plea were not stated to have occurred before the commencement of the suit, which is necessary since the new rules of pleading, as the plea speaks as of the day of its date, not the date of the declaration: *Tucker v. Webster* (d). We think this objection is not well founded, for the dates may be assumed to be material on demurrer, when, if they were truly stated, they would support the plea, according to the doctrine laid down in *Nightingale v. Wilcoxon* (e), and since in the late case of *Whittaker v. Harrold*, in error; and we must therefore intend that the administering of the assets, which is the material allegation, was before the commencement of the suit, the date of the writ being stated; and the Court, it seems, is always presumed to have it before them on demurrer: *Shepherd v. Shepherd* (f), per *Tindal*, C. J.

(a) Willea, 40.

(b) 1 Lev. 161; 1 Keb. 865.

(c) 10 M. & W. 371.

(d) 10 M. & W. 371.

(e) 10 B. & C. 202.

(f) 3 D. & L. 200.

The other objection, of duplicity, we do not consider as sustainable. The allegation of the probate is only inducement to the substantial averment which follows, and does not render the plea double; and if it did, the duplicity is not pointed out on special demurrer. Duplicity at common law is only cause of special demurrer, and though the statutes 27 Eliz. c. 5, and 4 Anne, c. 16, do not apply to pleas in abatement, we are not aware that the rule of the common law does not.

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Judgment quod breve cassetur.

THE BELFAST AND COUNTY DOWN RAILWAY COMPANY
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Jan. 11.

OGLE had obtained a rule nisi to rescind so much of an order of *Platt*, B., and rule of court thereon, as allowed the defendant to plead the second plea pleaded in this case.

The declaration, which was in debt, stated that "whereas the defendant, before and at the time of the commencement of this suit, to wit, on the 10th June, 1847, was and still is the holder of divers, to wit, ten shares in the said company, and, at the time of the commencement of this suit, was and still is indebted to the said company in a large sum of money, to wit, £150, in respect of two several calls, the first of the said calls being a call of a certain sum of money, to wit, 2*l.* 5*s.* upon each of the said shares, and the other of the said calls being a call of a certain other

In the general form of declaration given by the Companies Clauses Consolidation Act, (8 & 9 Vict. c. 16, s. 26), in actions for calls on shares, the allegation, "that defendant is the holder of shares," means that he was the holder at the time the call was made. Therefore, where a declaration in an action for calls stated, that the defendant, at the time

of the commencement of the suit, was and still is the holder of shares, and, at the time of the commencement of the suit, was and still is indebted to the plaintiffs for calls on those shares, &c., whereby and by force of the 8 & 9 Vict. c. 16, and the special act, an action accrued &c., and the defendant pleaded, that, at the time of the commencement of the suit, he was not the holder of the said shares, and also that he was not the holder of the shares at the time the calls were made, the Court, on motion, struck out the latter plea, and amended the declaration and former plea by striking out the words "at the commencement of the suit."

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sum of money, to wit, £5 upon each of the said shares, theretofore respectively, to wit, on the 1st October, 1846, and on the 8th April, 1847, respectively, duly made by the said company; whereby an action hath accrued to the said company, by virtue of an act of Parliament made and passed in a session of Parliament holden in the eighth and ninth years of the reign of her Majesty Queen Victoria, intituled &c. (8 & 9 Vict. c. 16), and also of an act of Parliament made and passed in a session of Parliament holden in the ninth and tenth years of the reign of her Majesty Queen Victoria, intituled &c. (9 & 10 Vict. c. lxxxvii), to demand and have of and from the defendant the said sums &c. Breach, non-payment.

The pleas allowed by the learned judge were, first, *nunquam indebitatus*: secondly, that, at the time of the commencement of the suit, the defendant was not the holder of the said shares in the said company, or of any of them, *modo et formâ*: thirdly, that the defendant was not the holder of the said shares in the said company at the time when the calls were, or either of them was made, *modo et formâ*: fourthly, that the calls were not, nor was either of them, duly made *modo et formâ*.

Atkinson shewed cause.—The question turns upon the construction of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16. The 25th section enacts, that “if, at the time appointed by the company for payment of any call, any shareholder shall fail to pay the amount of such call, it shall be lawful for the company to sue such shareholder for the amount thereof, &c.” The 26th section, which prescribes the form of declaration, enacts that “it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company, (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount,

in respect of one call or more upon one share or more, (stating the number and amount of each of such calls); whereby an action hath accrued to the company by virtue of this and the special act"). The word "is" in that section has reference to the time of the commencement of the suit. By permission of the company, a shareholder may transfer his shares after a call is made; so that if the second plea be struck out, the defendant would be precluded from raising the question whether he was a shareholder at the time the action was brought. The allegation in the declaration, that the defendant before and at the time of the commencement of the suit was and still is the holder of shares, is a material averment, and therefore traversable. As this declaration is framed, no question could arise as to whether the defendant was the holder of shares at the time the calls were made; consequently the objection, if any, is to the third plea.

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Ogle, in support of the rule.—The plea of *nunquam indebtedatus* puts in issue every material allegation in the declaration. If the second plea were found for the defendant, the plaintiff would be compelled to move for judgment *non obstante veredicto*, for the defendant might have been the holder of shares at the time the calls were made. The 27th section of the act enacts, "that on the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant at the time of making such calls was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear, either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed

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interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period." [*Parke, B.*—That section shews what the legislature meant by the word "is" in the 26th section. The declaration ought simply to have stated that the defendant is a shareholder, and indebted to the company for calls; the allegation that he was a shareholder at the time of the commencement of the suit raises a doubt whether the plea of "never indebted" would answer the whole declaration. The legislature says, that under the allegation that the defendant *is* the holder of shares, it shall be sufficient to prove him a holder at the time the call was made. *Alderson, B.*—It is unnecessary to have both the second and third pleas, because they either mean the same thing, or if not, one is useless. The difficulty is, that the evidence to be given at the trial would prove the third plea, and yet that plea does not traverse anything alleged in the declaration]. In order to ascertain the defendant's liability, the time to be looked to is the time when the call was made. Suppose a call made on the 1st January, to be paid on the 1st February, and a shareholder transferred his shares on the 1st March, and on the 1st May the action was commenced, in such case the person to whom the shares were transferred would not be liable. [*Parke, B.*—An issue concluding to the country should be joined on a direct affirmative and negative. If you compare the 26th and 27th sections of the statute, it is evident that the term "is," in a declaration correctly framed, would mean "is at the time of calls made." That is the proper construction to be put upon the issue. The objection to this declaration is, that it does not follow the parliamentary form, but interpolates the words "at the commencement of the suit." The rule ought to be absolute to amend the declaration and second plea, by striking out the words "at the time of the commencement of the suit," and to strike out the third plea altogether.

Then the allegation, that the defendant "is the holder of shares," would be traversed in the sense in which that expression is used in the 26th section of the statute.]

Rule accordingly.

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KERSHAW v. BAILEY.

Jan. 15.

SLANDER.—The declaration stated, that before the committing of the grievance, &c., at a vestry then held in and for the township of Barnsley, in the parish of Silkstone, in the West Riding of the county of York, the plaintiff was duly elected and chosen by the men inhabiting and resident within the said township to be one of the constables of and for the said township, for one year from thence next following, to do and execute all and singular those things which belong to the office of constable; but the plaintiff had not, at the time of the committing of the grievance by the defendant, taken oath for the execution of his said office: and whereas, on the occasion of the defendant's committing of the grievance, and speaking of the words by him as hereinafter mentioned, to wit, on &c., a special petty sessions of her Majesty's justices of the peace in and for the West Riding of the county of York, acting in and for the upper and lower divisions of the wapentake of Staincross, in the said West Riding of the said county of York, was had and held at Barnsley, in and for the said divisions, for the appointment of parochial constables, and the plaintiff then appeared and was present before J. Thorneley, Esq., J. Taylor, Esq., and the Rev. W. Wordsworth, clerk, respectively then and

Under statute 5 & 6 Vict. c. 109, the vestry, on precept from the justices, are to make out and return a certain number of persons within the parish, qualified and liable to serve as constables; the list is to be affixed on the church door, and notice given when and where objections will be heard by the justices, who are empowered, at a special sessions, to strike out of the list the names of persons not qualified or liable to serve. At a vestry held in pursuance of that act, the plaintiff's name was inserted in the

list of persons qualified and liable to serve, and he attended a session for the purpose of being sworn in, when the defendant, a parishioner, objected to him, and made a statement to the justices, in the presence of other persons, imputing perjury to the plaintiff. In an action for slander the jury found that the defendant made the statement *bonâ fide*, believing it to be true:—*Held*, that the statement was properly made before the justices, and was a privileged communication.

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there being justices of the peace of our said lady the Queen in and for the West Riding of the said county, and acting in and for the said divisions, assembled at that sessions as such justices, in order that they might cause to be administered to him the oath required by law to be taken by the plaintiff for the due execution of his said office of constable, and that the plaintiff might take that oath; and the defendant then and there, before the said justices, before his speaking and publishing of the words by him, as hereinafter mentioned, objected to the plaintiff being sworn, and to the plaintiff being allowed to take the said oath; yet the defendant, contriving and wilfully and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to injure him in his said office, and to induce the said justices not to administer the said oath to him, and prevent him taking the same, theretofore, to wit, on &c., in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning him in his said office, and of and concerning the said objection so made by the defendant as aforesaid in the presence and hearing of the said justices, and divers other persons, in the presence and hearing of the said justices, and those persons, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in his said office, and of and concerning the said objection so made by him as aforesaid, the false, scandalous, malicious, and defamatory words following, that is to say, "I (meaning the defendant) object to Kershaw (meaning the plaintiff, and meaning that he objected to his being sworn, and to his being allowed to take the oath aforesaid) on account of his (meaning the plaintiff) being a person not to be believed upon his oath. He (meaning the plaintiff) is a person who would say and swear anything. He (meaning the plaintiff) is a perjured fellow, and would do anything to gain his (meaning the plaintiff's) own ends. He (meaning the plaintiff) is an

improper person to be a constable, and not worthy of being trusted." By means of which premises the plaintiff hath been and is greatly injured in his said office and otherwise, &c.

Plea, not guilty, and issue thereon.

At the trial before *Pollock*, C. B., at the Middlesex sittings after Michaelmas Term, 1847, the following facts were proved:—On the 11th February, 1847, a vestry meeting was held in the township of Barnsley, for the purpose of nominating and electing a competent number of persons qualified and liable to serve as constables for the current year, to be returned to the justices in petty sessions. At that meeting the plaintiff was duly nominated and elected as a person qualified and liable to serve as a paid constable for the township of Barnsley. On the 29th March, a petty session was holden at Barnsley, for the purpose of swearing into office the constables returned from the parishes and townships of the West Riding of Yorkshire. On that occasion, upon the Barnsley list being called over, it was asked if anybody had any objection to make to the persons named in that list, upon which the defendant, who was a pawnbroker in Barnsley, said that he objected to the plaintiff, and he then spoke, in the presence and hearing of a number of persons, the words set out in the declaration. One of the justices observed that "it was a grave charge, and that this was not the proper time to make it." The defendant replied, "I know that I ought to have taken the objection before the vestry, but I feel it my duty to make this statement, that the justices may be aware of Kershaw's character."

On behalf of the defendant, it was urged that the statement did not impute an indictable offence, or if it did, that it was a statement made after being called upon by a competent authority, *bonâ fide* and for the purpose of furthering the ends of justice, and therefore a privileged communication, for which the defendant was not liable without proof

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of express malice. On the part of the plaintiff it was contended, that the power of election was in the vestry, and not in the justices, and that the objection ought to have been taken before the vestry; that the justices had no authority to hear any other objections than those made by the parties themselves; and that a statement made to the justices in the presence and hearing of a number of other persons was not a privileged communication.

The Lord Chief Baron ruled that the right of election was with the justices, and not with the vestry; and that, if the statement was *bonâ fide* and honestly made, and the defendant thought at the time it was true, he had a right to make it, and the jury should find their verdict for him; if not, and if the jury thought the defendant intended to impute an indictable offence, then they should find for the plaintiff. The jury having found a verdict for the defendant,

Overend now moved for a new trial, on the ground of misdirection.—Formerly constables were elected by a court leet, and sworn in by the steward or lord of the manor, and in their absence by the justices. That practice was altered by the 5 & 6 Vict. c. 109. The second section of that act requires “the justices, within the first seven days of February in every year, to issue a precept, under the hands of any two of them, to the overseers of each parish within the division, requiring them to make out and return, before the twenty-fourth day of March in each year, a list in writing of a competent number of men, within their respective parishes, qualified and liable to serve as constables.” The third section enacts, “that the overseers of every parish, upon the receipt of such precept, shall summon a meeting of the inhabitants in the vestry, to be holden within fourteen days after the receipt of the said precept, and the vestry at such meeting shall make out a list in writing of such number as shall be named in the precept of men residing within their parish, who shall be qualified and liable to serve as con-

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stables," &c. The eighth section requires the overseers, "on the three first Sundays in March, to fix a copy of such list on the principal door of every church, chapel, &c., within the parish, having first subjoined to every such copy a notice, stating that all objections to the list will be heard by the justices of the peace, at a time and place to be mentioned in such notice." That list is to be returned to the justices. By the tenth section, the overseers are to attend the special session, and verify the lists, "and if any man not qualified and liable to serve as constable, as aforesaid, is inserted in any such list, it shall be lawful for the justices, upon being satisfied by the oath of the party complaining, or upon other proof, or upon their own knowledge, that he is not qualified and liable to serve as constable, to strike his name out of such list." The eleventh section enacts, "that when any list shall have been allowed, the justices shall choose from the allowed list the names of such number of persons as they shall deem necessary," &c. The justices have only power to strike out of the list persons not qualified or not liable to serve. It is not competent for the justices to inquire into the character of a party duly inserted in the list; their allowance is merely a ministerial act. The eighteenth section, which relates to paid constables, enacts, "that it shall be lawful for the vestry, assembled for the purpose of making such return as aforesaid, to resolve that one or more paid constables shall be appointed for their parish, and if the vestry shall so resolve, a copy of the resolution and of the amount of salary which the vestry shall resolve on paying to such constable or constables shall be sent by the overseers to the justices." By the nineteenth section, the justices, "upon receiving from the parish a copy of any such resolution, if they shall be satisfied with the amount of salary agreed to be paid, shall appoint so many paid constables to act for the parish as shall be agreed to by the resolution," &c. The justices are thus confined to the lists returned by the vestry.

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PARKE, B.—I think there ought to be no rule. In the first instance the vestry are to make out a list of persons qualified and liable to serve as constables, and out of that list a certain number are to be selected by the justices. As the vestry are to determine about the particular qualification of the persons named, the defendant might, no doubt, have objected at the vestry that the plaintiff's name ought not to be on the list. After the list is made out the justices are to select, and if a parishioner wishes to make any objection, that is the proper time for doing so.

ALDERSON, B.—There is this difference between the case of paid and unpaid constables. With respect to the latter, the vestry are to make out a list of persons qualified and liable to serve, with power for the justices to select. As to paid constables, inasmuch as the vestry have no right to choose them, they are to send to the justices a resolution that the parish shall have certain paid constables, and the justices are themselves to make the selection, not, however, necessarily from the list of names returned by the vestry.

PLATT, B.—I think the defendant chose the most proper occasion for making his objection, and that it was his bounden duty to do so. Was he to stand by and see a person elected whom he believed to be perjured, and not take any objection?

Rule refused.

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The ATTORNEY-GENERAL v. SIMCOX and Another.

Jan. 18.

THIS was an information filed by the Attorney-General against the defendants, for legacy duty claimed to be due from them to the Crown, as executors of John Simcox, who was the surviving executor of Joseph Bissell, deceased.

At the trial before *Pollock*, C. B., at the sittings after Trinity Term, 1844, the jury found a special verdict, in substance as follows:—

The said Joseph Bissell, on the 13th of June, 1816, made and published his will, duly executed and attested, and thereby appointed John Bissell and John Simcox executors and trustees of his said will; and, after giving certain legacies, and making certain bequests therein mentioned, gave the residue of his personal estate (other than leasehold) to his said trustees, upon trust that they or the survivor of them, his executors or administrators, should, so soon as conveniently could be after his decease, sell and dispose of such parts thereof as should not consist of money or securities for money, for the best rates or prices which could be obtained for the same, either by public sale or auction, or private contract, and should collect, recover, and receive all debts and sums of money which should be due and owing to him at the time of his decease, and should place out or invest the money to arise from such sale, and the debts and sums of money to be collected and received as aforesaid, upon or in government, freehold, or leasehold securities, at interest, or invest the same, or any part thereof, in the purchase of stock in any of the public companies or funds, and alter, vary, and change the same securities, stocks, or funds from time to time for others of a like nature, at their or his discretion, and should receive and take the interest, dividends, and annual proceeds of the

Where real estate was devised to trustees, in trust to convey the same unto and among certain persons mentioned in the will, in equal proportions, in severalty; and, for the purpose of such division and partition, the trustees were empowered from time to time to sell all or any part of the devised estates, and were to stand possessed of the money to arise from such sales, in trust for the same persons, share and share alike; and the trustees accordingly, for the purposes of the trust, sold the whole of the devised estates:—*Held*, that this was "real estate directed to be sold," within the meaning of the Stamp Act, (55 Geo. 3, c. 184, Sched., pt. 3, tit. "Legacies"), and that legacy duty was payable upon the proceeds of such sale.

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said trust monies, securities, stocks, or funds, and pay the same as in the said will mentioned; and also, after having by his said will devised and disposed of certain freehold and leasehold property to certain persons therein mentioned, as in the said will particularly mentioned, gave and devised in manner following, that is to say:—"Also, I give and devise all that the messuage and outbuildings lately erected by me, and not now indeed complete, on part of the land which I bought of — Moore, situate &c., unto the said Ann Shaw and her assigns, for and during the term of her natural life, and from and after her decease unto and to the use of my said trustees and their heirs, upon trust nevertheless, and for the intents and purposes hereinafter expressed and declared of and concerning the same. Also, I give and bequeath unto the said Ann Shaw two suits of mourning. Also, I give, devise, and bequeath all my freehold messuage, outbuildings, and land, situate &c., and also all my eight leasehold messuages, outbuildings, and land, situate &c., and also all my freehold messuages, outbuildings, and land, situate &c.; unto my said brother, Richard Bissell, and his assigns, for and during the term of his natural life, he and they keeping the same in repair, and duly paying the ground-rent, and performing the covenants contained in the lease under which I hold the said leasehold messuages, outbuildings, and land; and from and after his decease, as to the said freehold messuages, &c., to the use of my said trustees and their heirs, executors, and administrators, according to the natures thereof, for all my estate and interest therein, upon the trusts nevertheless, and for the intents and purposes hereinafter expressed and declared of the same respectively. Also, I give and devise all my freehold messuage, situate &c., and also all my undivided parts or shares of and in the freehold messuage or public-house lately called the Coach and Horses, and also of and in the freehold shops and outbuildings, situate &c., and also all those my freehold messuages, shops, and lands, situate &c., and

all other my real estate, unto and for the use of my said trustees, the said John Bissell and John Simcox, and their heirs, nevertheless upon the trusts, and to and for the intents and purposes hereinafter expressed and declared of and concerning the same;" and which said trusts, intents, and purposes were in and by the said will declared to be as follows; that is to say, upon trust that the said trustees and their heirs should stand seised and be possessed of the said freehold messuages, buildings, lands, hereditaments, and premises, which were devised and bequeathed unto them in possession and remainder, upon the trusts, and for the intents and purposes following; that is to say, upon trust that they the said trustees, their heirs, executors, and administrators, should receive and take the rents, issues, and annual proceeds thereof, and after applying part thereof to certain purposes in the said will mentioned, should pay the residue thereof, as and when received, unto his the said testator's brothers and sister, John Bissell, one of the said trustees and executors, Benjamin Bissell, and Mary Fisher, or otherwise suffer and empower them respectively to receive and take the same, in equal proportions, share and share alike, during their joint lives; and that, after the decease of any one of them, then they the said trustees, their heirs, executors, and administrators, should pay the same as and when received unto the two survivors of them, or otherwise suffer and empower such survivors respectively to receive and take the same in equal proportions during their joint lives; and that, after the decease of either of them, they the said trustees, their heirs, executors, or administrators, should pay the same as and when received unto the only survivor of the testator's said brother and sister, or otherwise suffer or empower him or her to receive and take the same during his or her life; and the said testator Joseph Bissell declared his will to be, that, from and after the decease of the last survivor of the said brothers and sister, then that the said trustees, or the survivor of

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them, his heirs, executors, and administrators, should, at the expense of the said trust estate, convey and assign the said freehold messuages, buildings, lands, hereditaments, and premises devised and bequeathed to them as aforesaid, to all the testator's nephews and nieces, children of all his brothers and sister, which should be living at the time of his the said testator's decease, in equal proportions, as nearly as they the said trustees, or the survivor of them, his heirs, &c., could make partition of the same, and their heirs, executors, and administrators, in severalty, and not as tenants in common; and that in the meantime, and until such conveyances, assignments, and partition should be made, they the said trustees, or the survivor of them, his heirs, &c., should receive and pay the rents, issues, and annual proceeds of the said freehold messuages, &c., unto his said nephews and nieces, and their heirs, executors, and administrators, in proportion to the shares and interests they would take in case such partition had been completed, to and for their own use and benefit; and the said testator Joseph Bissell declared his will to be, that for the purpose of such division and partition of his said freehold messuages, &c., it should and might be lawful for, and he did thereby authorise and empower, his said trustees, and the survivor of them, his heirs, &c., from time to time to sell and dispose of all or any part or parts of the said freehold messuages, &c., and real estates devised and bequeathed to them upon the before-mentioned trusts, either by public sale or auction or private contract, and entirely or in parcels, for the most money that could be obtained for the same, and at the expense of the said trust estate, and to employ one or more surveyor and appraiser, surveyors and appraisers, for the purpose of ascertaining the value thereof, and to prepare and deliver abstracts of the title, and enter into, make, and execute such contracts, deeds, agreements, conveyances, and assurances, as should be necessary for the due execution of the said trusts; and the said testator did will and

declare, that they the said trustees, or the survivor of them, his heirs, &c., should, in case the whole of the said freehold messuages, &c., should be sold for the purposes aforesaid, stand and be possessed of the money to arise from such sale, and from the rents, issues, and annual proceeds of the said freehold estates and premises in the meantime, upon trust for the same persons, in the same shares and proportions, manner, and form, as in the said will is mentioned and declared of and concerning certain trust monies, securities, stocks, or funds, to be produced by the residue of the said testator's personal estate, and the interest, dividends, and annual proceeds thereof; and which said last-mentioned trusts relating to the said trust monies, securities, stocks, and funds, were as follows, that is to say:—upon trust that they the said trustees, or the survivor of them, his executors or administrators, should receive and take the interest, dividends, and annual proceeds of the said trust monies, &c., and pay the same, as and when received, unto his the said testator's brothers and sister, John Bissell, Benjamin Bissell, and Mary Fisher, or otherwise suffer and empower them to receive and take the same in equal proportions, share and share alike, during their joint lives; and after the decease of either of them, then should pay the same as and when received unto the two survivors of them, or otherwise suffer and empower such survivors respectively to receive and take the same in equal proportions during their joint lives; and after the decease of either of them, then should pay the same as and when received unto the only survivor of the said testator's brothers and sister, or otherwise suffer and empower him or her to receive and take the same during his or her life; and from and after his or her decease, then the said testator declared that the said trustees, their executors and administrators, should stand and be possessed of the said trust monies, &c., and the interest, dividends, and proceeds thereof, upon trust for all his the said testator's nephews and nieces, children of his brothers and sister,

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which should be living at the time of his decease, in equal proportions, share and share alike, the shares of such of them as should have attained the age of twenty-one years to be paid or transferred to them as soon as conveniently could be after the decease of the last survivor of the said testator's brothers, John and Benjamin, and his sister Mary, and the shares of such of them as should not then have attained that age to be paid or transferred to them respectively when and so soon as they should attain that age, and the interest, dividends, and annual proceeds of their respective shares to be applied by the said testator's trustees, or the survivor of them, his executors or administrators, in their maintenance, and for their education, use, and benefit in the meantime. And the said testator did by his will further direct, that in case any part or parts, but not the whole of the said estates and premises, should be sold for the purpose aforesaid, then that they the said trustees, and the survivor of them, his heirs, executors, and administrators, should stand and be possessed of the money to arise from such last-mentioned sale, and from the rents, issues, and profits of the messuages, &c., sold in the meantime, upon trust to pay and apply the same to and amongst his the said testator's nephews and nieces, and their heirs, executors, and administrators, not taking any or their full shares of the freehold and leasehold messuages, &c., and real and leasehold estates in specie, in just proportions, for equality of partition.

The said Joseph Bissell died on the 7th August, 1819, without having revoked or altered his said will. At the time of making his said will, the said testator was seised in his demesne as of fee of and in, and possessed of, the said freehold messuages, &c., so devised to the said trustees, and continued to be so seised and possessed of the same until and at the time of his death.

The said John Bissell and John Simcox survived the testator, and took upon themselves the burthen of the exe-

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cution of the will. Richard Bissell died on the 9th December, 1823. The testator's brothers and sister, that is to say, the said John Bissell, one of the said trustees, Benjamin Bissell, and Mary Fisher, survived the testator. Mary Fisher died in October, 1824; John Bissell died on the 18th of August, 1828; Benjamin Bissell died in June, 1832; Ann Shaw died on the 29th of August, 1830. On the 14th March, 1837, John Simcox died, having made his will, whereby he gave and devised the said freehold messuages, &c., of which he was seised as such surviving trustee as aforesaid under the will of the said testator Joseph Bissell, to his sons John Simcox and Thomas Simcox (the defendants), their heirs and assigns, subject nevertheless to the trusts contained in the will of the said Joseph Bissell. The said John Bissell and John Simcox the elder, during their lifetimes, and the said John Simcox the elder, since the decease of the said John Bissell, respectively, did always from time to time receive and take, and the said John Simcox the younger and Thomas Simcox, since the decease of the said John Simcox the elder, have always from time to time received and taken, the rents, issues, and annual proceeds of the said freehold messuages, &c., and have always from time to time paid and applied the same to the several persons, for the several purposes, and in manner directed by the said will of the said testator Joseph Bissell.

At the time of the death of the said testator Joseph Bissell, there were living ten nephews and nieces of the said testator, being respectively children of all his brothers and sister; that is to say, Joseph Bissell the younger, son of the testator's brother Thomas Bissell; Joseph Bissell, the only child of the said John Bissell by his first wife; Sarah Bissell, John Bissell the younger, Lydia Bissell, Mary Ann Bissell, Isaac Bissell, Thomas Bissell, and Susannah Bissell, the children of the said testator's brother John Bissell by his second wife; and Susannah Smith, the

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daughter of the said testator's sister Mary Fisher. [The special verdict then proceeded to state the subsequent devolutions of the respective estates and interests of the nephews and nieces, which it is not necessary to set forth.]

The said John Simcox the elder, after the decease of the said Benjamin Bissell, the last survivor of the said testator Joseph Bissell's brothers and sister, did not during his lifetime, nor did the said John Simcox the younger and Thomas Simcox, or either of them, after the decease of the said John Simcox the elder, convey or assign the said freehold messuages, &c., so devised by the will of the said Joseph Bissell, to the said nephews and nieces of the said testator, or any of them, or to any of their representatives, as by the said will they were authorised and empowered to do. The said John Simcox the elder, after the decease of his co-trustee the said John Bissell, and the said John Simcox the younger, and Thomas Simcox, after they had become and were seised under the will of the said John Simcox of the said freehold messuages, &c., as aforesaid, that is to say, on the 30th March, 1833, and at other times afterwards, in pursuance of the authority and power given by the said will of the said Joseph Bissell, for the purpose of dividing and making partition of the said freehold messuages, &c., sold, partly by public auction and partly by private contract, all the said freehold messuages, &c., the produce of which said sales, after deducting the necessary expenses thereof, amounted to the sum of 9064*l.* 18*s.* 9*d.*, which said sum then became and was divisible and payable in the following shares and proportions [stating the several parties to whom each tenth share was payable.] If any duty was payable for and in respect of the said bequest of the said shares of the proceeds of the sale of the said freehold messuages, &c., such duty then amounted, in respect of each of the said tenth shares, to the sum of 27*l.* 3*s.* 10½*d.*, and in the whole to 271*l.* 18*s.* 11½*d.* [The special verdict then stated the payment over by the defendants, to the several parties

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entitled thereto, of their respective shares of the proceeds of the sale, without deducting the legacy duties, and the demand by the Commissioners of Stamps and Taxes of legacy duty thereon.] But whether or not, upon the whole matter aforesaid, the said defendants do owe or are liable to pay to her Majesty, or are indebted to her Majesty in the said last-mentioned money, or any part thereof, in manner and form as in and by the said information is alleged, the jurors aforesaid are altogether ignorant, &c.

The case was argued in Trinity Term, 1845, (June 9 (a)), by

Crompton, for the Crown.—The question in this case depends upon the construction to be put upon the stat. 55 Geo. 3, c. 184, sched., part 3, tit. “Legacies,” the words of which, imposing the duty, are as follows:—“For the clear residue, when given to one person, and for every share of the clear residue when given to two or more persons, of the monies to arise from the sale, mortgage, or other disposition of every real or heritable estate directed to be sold,” &c. The question therefore is, whether the real estate, which under the will of this testator has in fact been sold by his trustees, was real estate which by the will was “directed to be sold.” If it be necessary for this purpose that the will should contain a positive and absolute direction to the trustees to sell *at all events*, that is certainly not to be found in this will; but such is not the reasonable interpretation to be put upon the statute. Whenever the will gives to the devisees an *option*, either to sell the estate and distribute the proceeds among the objects of the testator’s bounty, or to divide the estate among them without a sale, and they exercise that option by selling, it is in that event a direction to sell. The land is as much “directed to be sold” as in the other case, only it is directed to be sold, not absolutely, but upon

(a) Before *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

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the contingency of the trustees considering that to be necessary for carrying the testator's intentions into effect. The case of *The Attorney-General v. Mangles* (a) is a direct decision to this effect. There the testator gave his residuary real and personal estate to trustees, upon trust, at such times as they might think fit, to sell or otherwise convert the same into money, and divide the proceeds in certain shares amongst his children, with a power of causing any parts of the real or personal estate to be valued instead of being sold, and of allotting such parts to any of his children, at the amount of the valuation, as a part of his or her proportion of his residuary estate, but to be considered as personal estate. The trustees sold part of the real estate, and caused the remainder to be valued and allotted to the testator's son; and it was held that legacy duty was payable upon the amount of the part which was sold. There, as here, the words of the will were words of discretion, either to sell, or to value and allot the estate as land; and the discretion having been exercised by selling, the duty was held to attach. In the case *In re Evans* (b), which will probably be cited for the defendants, the testator devised real estates to trustees for the benefit of several persons for life, and after their deaths to be distributed amongst their children, &c., and the will contained a clause by which the testator declared and directed, that it should be lawful for the trustees to sell the same, or any part thereof which should appear most expedient towards the management of his property and affairs. In that case this Court certainly held that legacy duty was not payable upon the proceeds of a sale made under this power, considering that the terms of it did not amount to a direction to sell. There was not in that case, undoubtedly, an absolute direction to sell at all events; but, according to the principle laid down in *The Attorney-General v. Mangles*, there was a direction to sell

(a) 5 M. & W. 120.

(b) 2 C. M. & R. 201.

in a certain contingency mentioned in the will, namely, in case it should appear to the trustees most expedient towards the management of the testator's property and affairs. If, therefore, the case *In re Evans* is inconsistent with that of *The Attorney-General v. Mangles*, it must be taken to have been overruled. A direction to sell on the happening of a contingency is as much within the terms of the statute as a direction to sell at all events; and when the contingency happens, and the property is sold accordingly, the duty equally attaches.

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Cowling, for the defendants.—Assuming that the trustees have an option to sell, it still must appear on the face of the will, in order to make the legacy duty payable, that the testator meant to give a bequest of *personalty*, not of *realty*. A devise of realty is clearly not subject to duty. Now here the primary object of the testator is to give his residuary devisees the realty. He had a considerable amount of personalty as well as of realty; and the effect of the will is, that, with respect to the personalty, it should at all events be sold, and the proceeds invested, and the interest thereof paid and applied for the benefit of his brothers and sister, and the survivors and survivor of them, for their lives, and after their deaths for the benefit of all his nephews and nieces, share and share alike; but that, as to the real estate, after the death of the testator's brothers and sister, it should be divided, as real estate, amongst his nephews and nieces, the trustees having a contingent power only, if it should be necessary for the purpose of such partition, to sell the whole or any part of the property, and to stand possessed of the proceeds on the same trusts as had been before declared as to the personalty. It is, in truth, no more than a devise to certain persons for life, with remainder to trustees in fee in trust for others, with remainder to the nephews and nieces in fee; and the latter had a vested estate at the death of the testator. The power of sale is

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only collateral. The trustees are to divide the lands *as lands*; the primary object, therefore, is not a sale; and the trustees are not to sell at all events, but merely for the purpose of such division *of the real estate*. The power is merely given in furtherance of the testator's object, of dividing and distributing the real estate. [*Alderson, B.*—Suppose the tenant for life died, and one of the nephews died, and then there was a sale, whom would his share go to?] To his heir-at-law. [*Alderson, B.*—Yes, otherwise the trustees would have it in their power to change the disposition and devolution of the estate.] It is just as if the estate had been given directly to the devisees, and they had chosen to sell. It is immaterial by whom the power of sale is to be exercised. Suppose it were a power to sell *if required by* the devisees, would the proceeds be subject to legacy duty? The true doctrine is, that no duty is payable unless there is in the will a *positive direction* to sell. *In re Evans (a)* is a direct authority for that position. In *The Attorney-General v. Halford (b)*, where the testator did expressly direct the estate to be sold, but it not being necessary to sell it for the purposes of the will, the party beneficially interested elected to take the estate in specie, the Court held, that even though no sale had taken place, yet, as the testator had expressly directed the property to be sold, the duty was payable. *Williamson v. The Advocate-General (c)* supports the same view, that the duty is payable only where there is an express direction to sell—an absolute intention to convert the realty into personalty; and the case of *Darce v. Coutts (d)*, there cited, and in which the duty was held not to be payable, is precisely the present case. If the argument on the other side be well founded, that the duty attaches wherever there is a power of sale, which has been exercised, all the distinctions taken in the judg-

(a) 2 C., M., & R. 201.

(b) 1 Price, 426.

(c) 10 Cl. & Fin. 1.

(d) Morrison's Rep. 4624, 5595.

ments of Lords *Brougham* and *Cottenham*, in *Williamson v. The Advocate-General*, were altogether nugatory. They all say the test is,—was there a positive direction to sell or not? Thus, Lord *Brougham* says:—"The whole question depends upon this, whether or not the will, or the two instruments in the nature of a will taken together, amount to a direction to sell? If the language used by the testator amounts to a direction to sell the estate at his death, then the estate must be considered as money, and is to be dealt with as money, and the liability to legacy duty attaches." And again: "Taking the whole of these instruments together, I can entertain no doubt whatever that the intention of the testator was, and that he contemplated nothing else than that, in the event of his death without leaving an heir of his body, the land should be brought to sale." And Lord *Cottenham* states, as the criterion by which questions of this sort are to be determined, "whether this amounted to a conversion of the real property out and out into personalty, or whether it was to be considered as a discretion to sell for the purpose of paying off certain charges, debts, and so on." It is not necessary to impeach the authority of the case of *The Attorney-General v. Mangles*. That case is distinguishable from the present, because there the language of the will was in effect this:—"You shall sell, unless you shall think fit to have the estates valued instead of being sold, and allotted at the amount of the valuation." If the estates were sold under that positive direction, the duty attached. There was no option except under certain circumstances. This is the direct converse of that case. The present will amounts to no more than this: that, in order to avoid disputes among so large a family, the testator appoints as it were two arbitrators, who are to say whether and to what extent the property shall be sold, and the proceeds of the sale distributed instead of the land itself. A *direction to sell* must mean that such is the paramount intention of the testator. The language of the will is for this purpose to

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be construed strictly, and a mere *power* to sell, under certain circumstances and for certain purposes, cannot be a *direction* to sell. This will itself does contain such a positive direction as to the personalty. [*Alderson, B.*—The question is, whether a direction to sell contingent on certain events, if the estate be sold accordingly, is not to be considered as if the testator himself had waited for the happening of those events, and had himself sold. It would seem from the case of *The Attorney-General v. Mangles*, that where there is a discretion to sell, and a sale accordingly, that amounts to a direction to sell. The testator's *direction* is contingent on the trustee's *discretion*.] If the case of *The Attorney-General v. Mangles* is to be treated as an authority against the defendants, it is submitted that it is not law.

Crompton, in reply.—The only issue in this case really is, whether that of *The Attorney-General v. Mangles* was well decided. This is a direction to sell in a certain contingency. If there is a sale, the trust is of the personalty thereby created. It is not necessary there should be a positive direction to sell at all events; the words of the Stamp Act are "real or heritable estate directed to be sold," which may be upon a contingency. Under such circumstances, the duty attaches upon the real estate, as it does upon a specific chattel. The test cannot be whether the estate would go to the heir or to the executor, for that ambiguity would always occur where there is an option to sell or not. In *Williamson v. The Advocate-General*, no sale had taken place, and yet the duty was held payable.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an information filed by the Attorney-General, for legacy duty claimed to be due to the

Crown. On the trial, the jury found a special verdict, and the question is, whether on that verdict judgment ought to be entered for the Attorney-General, or for the defendants. The jury find, that Joseph Bissell, being seised of divers real estates, made his will, duly executed and attested, and thereby gave and devised his real estates to his trustees therein named, and their heirs, on trust to pay the rents and profits thereof to his brothers and sisters, John Bissell, Benjamin Bissell, and Mary Fisher, and the survivors and survivor of them, for their lives and the life of the survivor, as mentioned in the will. And after the death of the survivor, the testator declared his will to be, that his trustees should convey the said freehold estates to all his nephews and nieces living at his decease, equally, as nearly as they could make partition of the same, and should, in the meantime, pay the rents to his said nephews and nieces. And the testator declared his will to be, that, for the purpose of such partition, it should be lawful for his said trustees to sell all or any part of the said estates; and he declared that his trustees should stand possessed of the money arising from any such sale upon the same trusts as were declared concerning the residue of his personal estate; and those trusts were for his brothers and sister, and the survivor and survivors of them, for their lives, and the life of the survivor; and after the death of the survivor, then for all his nephews and nieces who should be living at his decease, share and share alike; the share of those who should have then attained twenty-one, to be then paid to them, and the shares of those who should be under twenty-one, to be paid on attaining that age, with provision for maintenance in the meantime.

The testator died in 1819, leaving ten nieces and nephews, and also leaving his sister and two brothers him surviving; and the survivor of his sister and two brothers died in 1832. In 1833, and at different times afterwards, the trustees sold the real estates for sums amounting in the

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whole to £9064, with the view of dividing the proceeds of the sales among the nephews and nieces, and their representatives, according to the directions of the will: and the question for our decision is, whether legacy duty is payable in respect of that sum. This depends entirely on the language contained in the schedule of the statute imposing the duty, the 55 Geo. 3, c. 184. The words of the statute are,—"for the clear residue, when given to one person, and for every share of the clear residue, when given to two or more persons, of the monies to arise from the sale of any real estate *directed to be sold*." Is this, then, an estate directed to be sold? if it is, then the duty attaches; if it is not, then no duty attaches.

There are two modern cases in this court in point. The first is *In re Evans* (a): there John Evans, the testator, by his will, gave, devised, and bequeathed all his real and personal estate to trustees, their executors and administrators, as to one-third, in trust for his sister, for her life; and, at her death, in trust for her children, their heirs, executors, and administrators, as tenants in common; as to one other third, in trust for his brother George, for his life; and at his death, in trust for his children, their heirs, executors, administrators, and assigns, as tenants in common; and, as to the remaining third, in trust, in the same manner, for his other brother, Fisher, for his life, with a like remainder to his children, their heirs, executors, administrators, and assigns, as tenants in common. The will contained a proviso, that, notwithstanding any of the trusts aforesaid, it should be lawful for the trustees to sell the premises, or any part thereof, or to make partitions or exchanges, as should appear to them most expedient towards effecting the arrangement of his property and affairs. And the testator declared, that the money to arise by any such sale or exchange should be invested in Government or real securities, or applied on the

(a) 2 C., M., & R. 206.

trusts thereinbefore declared concerning the property sold. After the death of the testator, the trustees sold certain outlying parts of the testator's estates. A suit having been instituted on the equity side of the Court of Exchequer, for carrying the trusts of the will into execution, other parts of the estates were sold pursuant to orders of the Court. The question was whether, in respect of the property sold, legacy duty was payable, and this Court, after deliberation, held that it was not, on the ground that the property was not *directed to be sold*, within the meaning of the Stamp Act.

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The other case is that of *The Attorney-General v. Mangles*. It occurred four years after the former decision, and it is to be found reported in 5 M. & W. 120. There a testator devised his real estates to trustees, upon trust to sell, at such times as they should think convenient, and to divide the money among his children, in manner mentioned in the will; but with a power, instead of selling any part of the estates, to cause them to be valued, and to allot them at the ascertained value, in lieu of so much of the share of the children to whom such allotment should be made. The trustees, under this trust, sold part, and allotted part without a sale; and this Court held it to be perfectly clear that duty attached on the money produced by the sales of the parts sold, though no duty attached in respect of the parts allotted without a sale.

If the former case, *In re Evans*, is to be taken as an authority that duty does not, in any case, attach where a testator does not imperatively direct a sale at all events, but only authorises his trustees, in case they shall deem it expedient, so to do, it is impossible to reconcile that case with the subsequent decision in *Attorney-General v. Mangles*. In the former case Lord *Lyndhurst* remarked, that it was not necessary, in order to bring a case within the words of the statute imposing the duty, where lands are *directed* to be sold, that the word "*directed*" should be found in the will, and that it was enough if the obvious intention of the tes-

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tator was that a sale should be effected. As the converse of that proposition, it may be remarked, that if duty is not to attach where the trustees are not bound to sell, but are only enabled so to do if they think fit, it is not material that the word "*directed*," or an equivalent expression, is found in the will. If, on the whole context, the intention appears to be that the trustees are to have a discretion to sell or not as they think fit, then the duty would not attach, if the law be as it was laid down, or is supposed to have been laid down, in the case *In re Evans*. But it is clear, from the subsequent case of *The Attorney-General v. Mangles*, that the existence of such a discretion does not prevent the duty from attaching. There, though the original trust was to sell, there was a clear subsequent discretion given to the trustees, to abstain from selling if they should think it expedient to do so. Yet in that case duty was held to attach; and the case, therefore, is an express decision, overruling the case *In re Evans*, supposing that case to have decided the general proposition, that duty only attaches where the trustees are bound to sell, and have no discretion on the subject. In this conflict or apparent conflict of authorities, we must look to the principle of the decisions, which of course are founded wholly on the language of the statute.

The duty, it will be observed, attaches on money which is given to one or more legatees, and which has arisen from the sale of estates directed by the testator to be sold. There is certainly nothing in the language of the statute, which in terms confines its operation to cases where the direction to sell is absolute. If a testator should direct his land to be sold, and the money to be divided among legatees, on any given contingency, as, for instance, in case his property should be under a certain value, or in case his son should succeed to a family estate, or in case A. B. should agree to concur in the sale, there surely can be no doubt but that, on the happening of the contingency and consequent sale, duty would attach. The land would then be land directed

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to be sold. So, again, if a testator should direct a sale of a particular estate, in case A. B. should think such sale to be for the benefit of the testator's children, then, upon A. B. signifying his opinion that it would be for the benefit of the children, the direction would be absolute, and duty would attach. It can make no difference that A. B. is himself the trustee for sale, and it follows that, in case of a devise to trustees to sell, if they shall think it expedient and for the benefit of the cestuis que trust so to do, duty would attach, if they do think it is expedient, and therefore sell. Now in the ordinary case of a devise to trustees in trust for specified objects, with a power to sell and distribute the produce of the sale amongst parties interested, instead of retaining the estate for them, the power of sale is certainly coupled with a trust to exercise the power or not, as they may deem most for the advantage of the cestuis que trust; and the devise may be read as a devise in trust to sell, if the trustees shall think such a course to be most beneficial for the parties interested, and in such a case we have already intimated our opinion that duty would be payable.

In the present case, the lands were devised to trustees, on trusts which may be fairly construed to mean that the trustees are to retain the estates unsold, and to allot them among the devisees, if they think that to be for the benefit of the objects of the testator's bounty; or, on the other hand, to sell and distribute the money produced by the sale, if that appears to them most expedient. The trustees, by selling, have shewn conclusively that they did think the most expedient course was to sell, and so in the event there was a direction to sell. Even, therefore, if there were no authority to guide us, we should have thought that duty attached: but in truth the case is governed by *The Attorney-General v. Mangles*, which is in principle the same as that before us, the only distinction being that there the devise was in trust to sell, with a power to abstain from doing so, and to allot the estate itself, instead of selling and distributing the

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proceeds; whereas here the devise is upon trust to allot, with a power, instead of doing so, to sell and distribute the proceeds. In both cases the trustees had a discretion to sell or not to sell, as they should think best for the cestuis que trust; and the exercise of that discretion by a sale was held, in *The Attorney-General v. Mangles*, to cause duty to attach; and the same principle precisely applies here. The only difficulty we have felt has arisen from the decision *In re Evans*, where certainly the Court seems to have decided that a sale, under a power to trustees to sell, is not a sale of property directed to be sold, within the meaning of the act.

The precise grounds on which the Court formed this opinion do not clearly appear. The decision may possibly have turned on the mode in which the proceeds of the sale were in that case disposed of. The statute does not impose duty in every case of a sale directed by a will, but only where the proceeds are by the will given to legatees. Now in the case *In re Evans*, the trustees were not directed to distribute the proceeds, but to invest them in securities, upon the same trusts as attached on the lands sold. Possibly the Court might have thought that this still left the character of real estate attaching on the money produced by the sale, and so that the statute did not apply.

It is not necessary for us to give any opinion as to the validity of such a distinction; it is sufficient to say, that if the case is to be taken as an authority for the general proposition, that duty does not attach in any case where the sale is made under a discretion given to the trustees to sell and distribute the proceeds, but without any positive direction imposing upon them the obligation of selling, the case is clearly overruled by *The Attorney-General v. Mangles*, and is, as we conceive, contrary to any fair and reasonable construction of the statute.

For these reasons, we think there must be judgment for the Attorney-General.

Judgment for the Crown.

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BUBON v. DENMAN.

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IN this case a rule had been granted for a trial at bar, on the 6th December, 1847, by a special jury of the county of Middlesex, and a venire facias and distringas issued accordingly. On the day appointed for the trial, only ten of the persons on the special jury list appeared, and the trial was in consequence put off until the following day. On that day only eleven of the jurors appeared, and the cause remained untried for want of a jury.

For defect of jurors on a trial at bar, a rule absolute granted for a writ of octo vel decem tales.

Robinson now moved, on behalf of the plaintiff, for a rule absolute for a writ of octo vel decem tales.—On a trial at bar, there cannot be a tales de circumstantibus, but it is necessary to move for the present writ; and it would seem, from Brooke's Abr., tit. "Octo tales et auters tales," pl. 11, that the number of jurors proposed to be added to the panel must be an even one (*a*).

PER CURIAM (*b*).—Take a rule absolute.

(*a*) But see 2 Tidd. Prac. 857; Gilb. Com. pl. 72; 2 Wms. Saund. 349, n. 1. (*b*) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Platt*, B.

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To a declaration containing three common counts, the defendant pleaded the general issue, and two special pleas. Each plea was directed to the whole declaration. The plaintiff had a verdict as to part of his demand on the first issue, and the defendant as to the residue. The second issue was found for the plaintiff, and the third for the defendant:—*Held*, that, as the defendant was entitled to the *postea* and the general costs, he was entitled to the costs of all witnesses attending to prove the third issue, whether their evidence applied to any other issue or not, and that he was also entitled to the costs of those who appeared to reduce the plaintiff's demand on the first issue, unless they attended to negative the second; that the plaintiff was entitled to the costs of the witnesses who appeared solely to prove the issues found for him under the first issue, and also the second issue, both or either of them.

MARTIN had obtained a rule, calling on the defendant to shew cause why the Master should not review his taxation in this case. It was an action of debt. The declaration contained counts for work and materials, for work and labour as an attorney, and on an account stated. The pleas were, first, never indebted; secondly, the Statute of Limitations; and thirdly, that no signed bill had been delivered in pursuance of the statute. Each plea was directed to the whole cause of action, and upon these pleas issue was joined. The plaintiff claimed the sum of 63*l.* 12*s.* 8*d.* in each of the counts of his declaration.

At the trial, before *Platt*, B., at the Middlesex sittings in Michaelmas Term, 1846, the plaintiff had a verdict on the first issue, for the sum of 18*l.* 10*s.* 3*d.*; and the defendant had a verdict upon the second and third issues. A rule was subsequently, in the same term, obtained by the plaintiff, calling on the defendant to shew cause why the verdict found for the defendant on the second issue should not be set aside, and why a verdict should not be entered thereon for the plaintiff, unless the defendant should consent, within a week, that the verdict should be so entered. The defendant, however, consented, and the verdict was entered on the *postea* as follows:—On the first issue, as to 18*l.* 10*s.* 3*d.*, parcel of the sum demanded, for the plaintiff, and as to the residue of the sum demanded for the defendant; on the second issue for the plaintiff; and on the third for the defendant.

Watson and *Hugh Hill*, on the last day of Michaelmas Term last, shewed cause against the above rule, and *Mar-*

tin was heard in support of it. The Court said that they would refer to the Master, in order to obtain his certificate as to the manner in which he had taxed the costs.

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Cur. adv. vult.

POLLOCK, C. B., now said—In this case a rule had been obtained by Mr. *Martin*, calling on the defendant to shew cause why the taxation of the Master, who taxed the costs, should not be reviewed; and cause was shewn against that rule in Michaelmas Term last. It was an action on an attorney's bill for £63 and upwards. The defendant pleaded, first, never indebted; secondly, the Statute of Limitations; and thirdly, that no signed bill had been delivered in pursuance of the statute. The plaintiff recovered, on the first issue, 18*l.* 10*s.* 3*d.*, and the defendant had a verdict as to the residue; on the second issue, the plaintiff had a verdict; and, on the third issue, the verdict was found for the defendant.

The defendant is entitled to the *postea*, and to the general costs of the cause. He is, therefore, entitled to the costs of all witnesses attending to prove the third issue, whether their evidence applies to any other issue or not. As to those who attended only to reduce the plaintiff's demand on the first issue, he is entitled to the costs in respect to them also, unless the same attended also to negative the second issue.

The plaintiff, on the other hand, is entitled to the costs of those witnesses who attended solely to prove those issues found for him; that is to say, his demand of 18*l.* 10*s.* 3*d.* under the first issue, and also the second issue, both or either of them. We have, therefore, referred to Master Walker to certify whether he has so taxed the costs in this case, and we find he has done so. The rule must therefore be discharged, with costs.

Rule discharged, with costs.

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Jan. 18.

WILSON v. EDEN, Bart., and Others.

A BILL in Chancery having been filed in this case by the plaintiff, to which the defendants put in their answers, and the cause being at issue, the same came on to be heard before the Master of the Rolls on the 8th of July, 1846, when his Lordship directed the following case to be stated for the opinion of this Court:—

Peter Johnson, late of the city of York, Esquire, by his will, dated the 1st day of February, 1779, duly executed and attested to pass freehold estates by devise, gave and devised to his wife and her assigns, during her life, in lieu severally and successively, and the heirs of their respective bodies; and for default of such issue, to the testator's grandson, M. J. E., the second son of his daughter, in case he should not become seised of certain estates (devised by M. D.); and after the death of M. J. E., the testator devised the said estates, upon the conditions aforesaid, to the first and other sons of M. J. E. severally and successively, to their heirs respectively and successively; and, in default of such issue, he devised his estates, on the like conditions as aforesaid, to the third and every other son of his daughter, severally and successively, and their heirs. And the testator declared, that if the said M. J. E., or any son of his daughter, should, at any time during his life, become seised of the real estates (devised by M. D.), then M. J. E., or such son of his daughter so becoming entitled, or any heir of his body, should not take any interest in the testator's estates, but they should go over to the next son of his daughter and his heirs, with a clause for revesting the estates in the son so displaced, on certain contingencies.

Provided "always, that if it shall happen that my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled by the true meaning of this my will to my real estates, hereby limited and settled as aforesaid, then and in either of those cases, I devise all my said real estates, subject respectively as aforesaid, to all the daughters, if more than one, of the body of my said daughter who shall be living at her death, as tenants in common, and their heirs respectively, with cross remainders amongst them, in case of any one or more of them happening to die under the age of twenty-one years, and without issue; and if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs. *Provided* always, that if any such daughter or daughters of my said daughter shall happen to die in her or their said mother's lifetime, leaving issue, then my will is that such issue of each such daughter so dying, and the heirs of such issue respectively, shall have and take the estate, or share or shares of estates, as the parent or parents of such issue respectively would have been entitled to if she or they had been living at the decease of my said daughter."

The proviso then concluded by devising the estates to those persons to whom the daughter might please to leave them by will, in case she should leave no issue male at her death; and in case she should not make any will, the estates were to go to the testator's heirs. The daughter, D., died in 1792, in the testator's lifetime, leaving two sons, R. E. and M. J. E., and several daughters. The testator died in 1796, when his widow became possessed of the estates, and died in 1810. At her death, R. E. became possessed of the estates until his death, which occurred in 1844; M. J. E. died in 1841; both died without issue:—*Held*, that the words "*living at her death*," in the preceding proviso, were to be read as connected with the verb "*shall have*," and referred to both members of the sentence in the commencement of the proviso; and consequently, as the testator's daughter, at the time of her death, had issue male entitled to the testator's estates, the daughters of the testator's daughter took no estate or interest under the will.

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of jointure, and in bar of dower, his manor of Arkendale, in the county of York, and all his hereditaments and estate whatsoever at Arkendale aforesaid, and in Arkendale Loft-house, and Minskip, in the said county, without impeachment of waste, and with power to let leases, without fines or foregift, for any term or terms not exceeding seven years respectively, in possession, at the best rents which could be reasonably obtained; also he devised to his said dear wife and her assigns for her life, his new dwelling-house on Castle Hill, at York, and all the buildings, gardens, yards, and appurtenances thereto belonging, or therewith occupied, and all his other houses, stables, and hereditaments whatsoever, situate in the parish of St. Mary Castlegate, York; and also his closes, called Stone Wall Close, (then divided into two parts), and Mudd Close, with all buildings and appurtenances thereto belonging, without impeachment of waste; and after giving several life annuities, all of which have ceased and determined, and after providing for the payments in the said will directed to be made, and which payments have been made, (and now no longer exist), the said testator devised to his said dear wife for her life all other his real estates whatsoever and wheresoever, which he had power to dispose of, to hold to her and her assigns, without impeachment of waste, and with like power to let leases, not exceeding seven years in possession, and with such restrictions aforesaid; and as to his said manor of Arkendale, and all his estate and hereditaments whatsoever, situate at Arkendale, and Arkendale Loft-house, and Minskip aforesaid, with all their appurtenances, and as to all his other real estate whatsoever and wheresoever, which he had power to dispose of, whether freehold or copyhold, from and immediately after the decease of his wife, the said testator devised the same respectively to his dear daughter and only surviving child Dorothea, the wife of Sir John Eden, Baronet, for her life, without impeachment of waste; and from and

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after the determination of that estate, he devised all the same premises to his good friends Sir Bellingham Graham, of Norton Conyers, in the county of York, Baronet, and Henry Willoughby, of Biredal, in the same county, Esquire, and their heirs, during the life of his said daughter, upon trust to preserve the contingent uses and estates thereafter limited from being defeated, and with all necessary and usual powers for that purpose, but nevertheless to permit and suffer his said daughter to receive the rents and profits of all the same estates to her own use during her life; and from and after the decease of his said daughter, he devised all the same estates to his grandson, Robert Eden, eldest son of his daughter, for his life, without impeachment of waste; and from and after the determination of that estate, he devised the same to the said Sir Bellingham Graham and Henry Willoughby, and their heirs, for the life of the said Sir Robert Eden, upon trust to preserve contingent uses. And from and after the decease of the said Sir Robert Eden, he devised the same to the first son of the body of the said Robert, and the heirs of the body of such first son lawfully issuing; and in default of such issue, to the second, third, and every other son of the body of the same Robert, severally and respectively, and the heirs of the respective bodies of such second and third, and every other son; the elder of such sons, and the heirs of his body, always to be preferred, and to take before the younger of them, and the heirs of their bodies respectively. And for default of such issue, he devised all the same real estates and premises to his grandson, Morton John Eden, second son of his said daughter, for his life, without impeachment of waste, (in case he should not become or should not continue seized of the real estates of Morton Davison, late of Beamish, in the county of Durham, Esquire, deceased, by virtue or in consequence of his will). And from and after the determination of that estate, he

devised his said real estates and premises to the said Sir Bellingham Graham and Henry Willoughby, and their heirs, during the life of the said Morton John Eden, upon trust to support the contingent uses. And from and after the decease of the said Morton John Eden, he devised the same (upon the conditions aforesaid) to the first and every other son of the body of the said Morton John Eden severally and successively, and to the respective heirs of the bodies of such first and every other son lawfully issuing; the elder of such sons, and the heirs of his body, always to be preferred, and take before the younger of them, and the heirs of their bodies respectively. And for default of such issue, he devised the same real estates and premises, upon the like condition as aforesaid, to the third and every other son of his said daughter, begotten or to be begotten, severally and successively, and the heirs of the body and bodies of such third and every other son lawfully issuing; the elder of such unborn sons, and the heirs of his body, always to be preferred, and take before the younger of them, and the heirs of his or their bodies respectively. And the said testator declared and provided, that if the said Morton John Eden, or any son of his (the testator's) daughter, should at any time during his life become seised of the real estates of the said Morton Davison, by virtue or in consequence of his will, then the said Morton John Eden, or such son of the said testator's said daughter so becoming seised thereof, or any heir of his said body respectively, should not take, have, or enjoy any estate or interest whatsoever in any of the said testator's real estates, by virtue of his said will, so long as he or they should be so seised of the real estates of the said Morton Davison, but the same should remain and go over (after the determination of the particular estates thereof thereby limited) to, and should be taken, held, and enjoyed by the next son in succession of the testator's said daughter, and the heirs of his body, in the same manner as if such son, so seised of the real estates of the said Morton Davison,

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was dead without issue; but if it should happen that the said Morton John Eden, or any such son who could or might become seised of the said real estates of the said Morton Davison, should afterwards become disabled by any condition or proviso in his will from continuing to hold and enjoy the same, then and as soon as the said Morton John Eden, or any such son of the said testator's said daughter, should have quitted the possession, and should be no longer in the receipt of the rents and profits of the real estates of the said Morton Davison, in conformity to any such condition or proviso in his will, the said Morton John Eden and the heirs of his body, or any such son of the testator's daughter, so circumstanced, and the heirs of his body, should and might have, hold, and enjoy all the said testator's real estates, thereby intended to be limited and settled as aforesaid, and according to the limitations thereof thereinbefore contained. And then the will of the said testator contained certain provisoes and limitations, which are in the words and figures following, that is to say: "Provided always, that if it shall happen that my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates hereby limited and settled as aforesaid, then and in either of those cases I devise all my said real estates, subject respectively as aforesaid, to all the daughters, if more than one, of the body of my said daughter, who shall be living at her death, as tenants in common, and their heirs respectively, with cross remainders amongst them, in case of any one or more of them happening to die under the age of twenty-one years, and without issue; and if there should be but one such daughter living at my said daughter's decease, and no issue of any such daughter then in being, then to such only surviving daughter and her heirs; provided always, that if any such daughter or daughters of my said daughter shall happen to die in her or their said mother's lifetime, leaving issue, then my will is that such issue of each of such daughters

so dying, and the heirs of such issue respectively, shall have or take the estates, or share or shares of the estates, as the parent or parents of such issue respectively would have been entitled to, if she or they had been living at the decease of my said daughter. And in case my said daughter shall have no issue of her body living at her death, then I devise all such my real estates, from and after the determination of the particular estates hereinbefore thereof limited as aforesaid, to such person or persons, and for such estate and estates, either in fee simple or otherwise, and in such manner, as my said daughter, whether married or sole, shall by any deed or deeds, executed in the presence of two credible witnesses, or by her last will and testament in writing, or any writing in the nature of a will, signed in the presence of three such witnesses, direct and appoint, and for want of any such appointment, and subject thereto, and the several limitations and charges in this my will, I leave all such real estates to descend to my own right heirs." And all the residue of his estate, real and personal, not thereinbefore disposed of, or not fully and effectually disposed of, the said testator gave to his said dear wife.

The testator made several codicils to his said will, but did not thereby alter the limitations of the real estates contained in his will, above set forth, and died in the year 1796, without having revoked or altered any of the aforesaid limitations.

Dorothea Johnson, the wife of the testator, Peter Johnson, entered into the possession of the said estates so devised to her as aforesaid for her life, or into the receipt of the rents and profits thereof, and continued in such possession or receipt until her death, which took place in 1810.

Lady Eden, the only child of the testator, Peter Johnson, died in his lifetime, in the month of June, 1792, intestate, having had two sons; namely, Sir Robert Eden, afterwards Sir Robert Johnson Eden, Bart., her eldest son and heir-at-law, and customary heir, (and who was also the heir-at-law and customary heir of the said testator, Peter Johnson, at

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the time of his decease), and the said Morton John Eden, and eleven daughters; namely, Dorothea Eden, Maria Eden, Catherine Eden, Elizabeth Eden, Caroline Eden, Dulcibella Eden, Anne Eden, Emmeline Eden, Eleanor Eden, Harriet Eden, and Charlotte Eden, and no other children.

Elizabeth Eden, Caroline Eden, and Harriet Eden, all died in the lifetime of their mother, the said Lady Eden, under the age of twenty-one years, and without having been married; but Lady Eden's other daughters, and her two sons, survived her; and Dulcibella Eden and Anne Eden having respectively attained the age of twenty-one years, died respectively in the year 1805, intestate, as to real estate, and without having been married, leaving the said Robert Johnson Eden, their eldest brother, their heir-at-law and customary heir.

Upon or shortly after the death of Dorothea Johnson, the widow of the said testator, Peter Johnson, Sir Robert Johnson Eden, Bart., (in the said will called Robert Eden), entered into the possession of the freehold and copyhold estates by the said will devised to him for life, or into the receipt of the rents and profits thereof, and continued in such possession or receipt until his death.

Morton John Eden, on the death of his father, Sir John Eden, became seised of the estates of the said Morton Davison, referred to in the will of the said testator, Peter Johnson, and died on the 28th of June, 1841, in the lifetime of his brother, Sir Robert Johnson Eden, and without ever having had any issue.

Sir Robert Johnson Eden, Bart., died on the 4th of September, 1844, without having had any issue.

Dorothea Eden, the daughter, intermarried, first, with Henry Methold, and secondly, with Daniel Seddon, both deceased; and she died in the year 1830, leaving Henry Methold, her eldest son, her heir-at-law and customary heir. Maria Eden intermarried, first, with Lord Aghrin (afterwards Earl of Athlone), and secondly, with Sir W. J.

Hope, G.C.B., both deceased, and she is now a widow. Catherine Eden intermarried with and is now the wife of Robert Eden Duncombe Shafto. Emmeline Eden intermarried with and is now the wife of Thomas Northmore. Eleanor Eden intermarried with and is now the widow of the Rev. Thomas Fownes Wilson; and Charlotte Eden intermarried with and is now the wife of Robert Kaye Greville.

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Sir Robert Johnson Eden, by his will, dated in 1815, and which was afterwards republished by a codicil thereto, in 1841, gave and devised all his estates, lands, and hereditaments, whatsoever and wheresoever, in Durham and York, and elsewhere in Great Britain, to certain uses in his said will mentioned (but which have failed to take effect), with an ultimate limitation to the use of the defendant, Sir William Eden, his heirs and assigns for ever. And the said Sir William Eden, as such devisee, did, on the decease of the said Sir Robert John Eden, enter into and is now in possession or in receipt of the rents and profits of the estates devised by the will of the said Peter Johnson.

The question for the opinion of the Court is, whether the daughters of Dorothea, the wife of Sir John Eden, Bart., in the pleadings of the said cause named, or any and which of them, took any and what estate or interest in the estates devised by the will of Peter Johnson, deceased, the testator in the pleadings in this cause named, or any and which of them. It is agreed that the will and codicils of Peter Johnson, and the will of Morton Davison, shall be considered as part of this case.

Humphry, for the plaintiff.—The question for the consideration of the Court turns upon the construction to be put upon the proviso in the will of Peter Johnson, the testator. It is submitted that, upon the true construction of that proviso, the eight surviving daughters of Lady Eden take all the estates mentioned in the will, as tenants in common in

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fee. Although this clause in the will is introduced in the language of a proviso, it is more properly to be considered as an extension of the incomplete chain of limitations, with reference to the estates contained in the preceding part of the will. This clause consists of two branches, one of which introduces the limitation to the daughters, by way of *remainder* expectant on the failure of the previous limitations, and is not to be considered in the nature of an executory devise. It may not be necessary to advert to the acknowledged rule of construction, that a proviso is not to be considered as an executory devise, if it is capable of being construed as a remainder, either contingent or vested. It is equally a rule of construction, that that which may be fairly construed to be a vested remainder, is not to be construed as a contingent remainder. The term *issue male* in the clause in question may create some difficulty. It must either be read as converting the preceding limitations in tail general into estates in tail male, or as leaving the gift to the daughters by way of remainder. Either construction does not militate against the plaintiff's argument; for the estate may be a remainder, whether it be expectant on estates in tail general, or in tail male. The words "issue male" may fairly be construed as meaning issue of a male stock. By that interpretation the previous limitations would receive no alteration. Now the testator, by the clause in question, contemplated two events, viz. if his daughter should have no issue male living at her death, "or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates hereby limited and settled as aforesaid." That is the other event which is to take place in a limited period, and on the determination of the previous limitations. These two events are clearly and completely defined. Now it is not necessary to import any words into this second branch, as its meaning is perfectly clear without the interpolation of any term. It will be contended that the words "living at her death" ought to be introduced into it, and that, therefore,

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the whole is contingent upon an event which did not, nor ever can happen. There are two distinct events contemplated and provided for by the testator. The second branch is therefore to be read by itself. It is, "If it shall happen that my said daughter shall have no such issue male as shall be entitled by the true meaning of this my will to my real estates hereby limited and settled as aforesaid, then and in such case I devise." This disposition is clearly to be construed as a remainder expectant on the previous limitations. The only difficulty arises from the presence of the words "such issue male;" but the usual mode of giving remainders after previous estates in tail, is to state that they shall go over if the party shall have no such issue. No specific term is mentioned within which the determination of the particular estates is to take place. The gift is to the daughters of the remainder in fee, provided only they be alive at the death of their mother, who have had no previous disposition whatever in their favour. If any of the daughters be dead and leave issue, such issue is to have the mother's portion; the only contingency is that of the daughter being alive at the time of her mother's death. The word "*such*," in the second branch of this clause, does not relate to the issue living at the daughter's death. As there were eight daughters alive at the death of their mother, the remainder, which was contingent during their mother's life, on that event became a vested remainder. It was the testator's intention that this gift should be by way of a remainder, since he says it is "from and after the determination of the particular estates thereof limited as aforesaid." Again, the testator has not by the first branch of the sentence effectually disposed of his estates in every event, and therefore this second branch was introduced by him, to dispose of any interest in his estates which he might not have previously disposed of. Authorities may be cited to shew that the proper principle of construction is, that where there are particular estates limited, and there is a gift over in terms which can be fairly considered as

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marking the effect of the determination of the preceding limitations, the proper construction is to construe them as words which introduce a remainder: *Doe d. Dacre v. Dacre* (a), which was afterwards affirmed in error (b); and the language of the judges may be referred to in support of this position. In the case of *Lethieullier v. Tracy* (c), where the question was as to the extent of the words "in default of such issue," Lord *Hardwicke* said, "The words are in default of such issue, not merely in default of issue of Sir Henry Nelthorpe, but of all other persons who take under this will and are before mentioned. Where the general intent appears to make a strict settlement, though some one limitation may, according to the words, seem contingent, yet the general intent shall prevail." Now it is submitted that, in the present case, it was the obvious intention of the testator to make a strict settlement.—He also referred to *Malcolm v. Taylor* (d), *Ellicombe v. Gompertz* (e), *Trickey v. Trickey* (f), and *Calthorpe v. Gough* (g).

Malins, contra.—Upon the true construction of this will, the daughters of Lady Eden do not take any estate whatever. It has been argued that the effect of the proviso in the will is to create a vested remainder in the daughters. The words of the proviso clearly introduce a contingency. There are two events pointed out by the testator, the first of which, it has been conceded, did not happen, for both the sons were living at the time of Lady Eden's death. The preceding part of the will affords a key to the meaning of the words in the second branch of the sentence contained in the proviso. The object of the testator was to prevent the Davison estates from

(a) 1 Bos. & P. 250.

(b) 8 T. R. 112.

(c) 3 Atk. 774.

(d) 2 Russ. & Myl. 421.

(e) 3 Myl. & Cr. 127.

(f) 3 Myl. & Keen, 560.

(g) 3 Brown's P. C. 395.

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being held together with his own real estates. Taking, therefore, the proviso with reference to the Davison estates, it is to be read as if the testator had said, "If my daughter shall not have any issue male living at her death, or the issue male living at my daughter's death shall be entitled to the Davison estates, in either of those cases I give the property over to the daughters of Lady Eden." The existence of issue male was to be an insuperable bar to the daughters' taking the estates. Now it is conceded that the words, "If it shall happen that my said daughter shall have no issue male of her body living at her death," apply to the first branch of the sentence, but it is contended that they ought to be excluded from the second. The only period to which the testator is addressing himself is the death of his daughter. Then everything is to be settled. Both branches of the sentence apply to that period; and when the testator gives the estates over to the daughters, he says, I give it to such of them as shall be living at her death. It is also extremely probable that the testator intended that the sons, as between them and their heirs, were to take as tenants for life only, but as between them and all the rest of the world, including their sisters, as tenants in fee simple. The Court, however, is bound by the language of the will, and the intention of the testator cannot be carried out unless that language authorises such a construction. In the case of *Doe v. Wilson* (a), the Court of King's Bench held that certain words in the will introduced a contingency, and that the words frustrated the intention of the testatrix. There was a difference of opinion in that case amongst the judges. Mr. Justice *Grose* said, that to give an estate in an event not pointed out by a testator was to make a will, and not to construe a will, and Mr. Justice *Ashhurst* was of the same opinion. Mr. Justice *Buller*, however, differed in opinion. The case of *Denn v. Bagshaw* (b) is often

(a) 2 T. R. 209.

(b) 6 T. R. 512.

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cited as one of very great hardship, which shews in a remarkable manner how the Courts feel themselves bound by the language of a testator. All the cases cited on behalf of the plaintiff proceeded, not upon formal and technical words, but upon informal and untechnical words in the wills, where the Courts were left to collect the intention of the devisor from the different parts of the wills: here formal and technical expressions are used. The case of *Fuller v. Fuller* (a) might have been cited on behalf of the plaintiff, where *Popham, J.*, said, if an estate be given to A. and the heirs of his body, and A. die in the lifetime of the devisor, the heir should take as a purchaser; but in the case of *Warner v. White* (b) the judges held that such a position was not tenable. The case of *Hodgson v. Ambrose* (c) also is an authority to the effect that the Courts feel themselves bound by the technical and unambiguous expressions used by testators, and that they have no discretion upon the subject. *Shuldham v. Smith* (d) is a high authority to the same effect. That case was argued much upon the same grounds as those taken by the present plaintiff. Sir *S. Romilly* said in his argument: "I cannot agree that it is a rule to lean against an intestacy. It must appear by declaration plain, or necessary implication, that the heir-at-law is disinherited. If you supply or take away words, there would be no difficulty in the construction of wills. But the rule is, that you are to add nothing, and to give effect to every word if possible. To say that the meaning is capricious, is nothing to the purpose. The question is, what has the testator said? and every other construction is no less absurd and capricious than ours, unless you add a whole string of limitations." The judgments, in that case, of Sir *Vicary Gibbs*, Lord *Eldon*, and Lord *Redesdale*, are practically applicable to the present. The cases of *Ellicombe v. Gompertz*,

(a) Cro. Eliz. 423.

(b) 3 Brown's P. C. 435.

(c) 3 Dougl. 337.

(d) 6 Dow, 22.

Trickey v. Trickey, and *Calthorpe v. Gough*, referred to by the other side, are cases of personal property; there the Courts merely held that in such a case as in that of the disposition of personal property, in order to prevent a gift over being void from default, it was best to insert the word "such," and to take it as a gift over on failure of issue. *Calthorpe v. Gough* was followed by *Doe v. Brabant* (a); both of these were held to be cases of great hardship, and the Courts struggled to effectuate the intention of the testators. [*Alderson*, B.—The reason is, that you cannot go beyond the meaning of the words used. If you were to do so, you would say something which is not in writing.] Upon the language of the will, the existence of issue male at the death of the daughter was an insuperable bar to the daughters taking the estates. In *Keene v. Dickson* (b), it was held that the word "male" could not be rejected. Here the gift over does not depend upon the failure of all the preceding limitations; but if there should not be issue male at the daughter's death, then the gift over was to take effect. That event did not happen, as she had issue male at that time, and therefore the daughters took no interest in the estates.

Humphry, in reply.—*Keene v. Dickson* is not now any authority (c). It is not necessary to import anything into the will.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a case sent for the opinion of this Court by Lord Langdale. It was fully argued last Trinity Term, before my brothers *Alderson*, *Rolfe*, *Platt*, and

(a) 4 T. R. 706.

(b) 1 Bos. & P. 254, n.

(c) See *Jarman on Wills*, Vol.

I, p. 729, and the observations there made on the case.

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myself. The question arises on the will of Peter Johnson, dated the 1st of February, 1779, whereby the testator devised large real estates to his wife for life; and after her decease, to his daughter Dorothea, wife of Sir John Eden, Bart., for her life; and after her death, to his grandson Robert Eden, eldest son of his said daughter, for his life; and after his decease, to the first and other sons of his said grandson severally and successively, and the heirs of their respective bodies; and for default of such issue, to his grandson Morton John Eden, second son of his said daughter, for his life, in case he should not become or should not continue seised of the real estates of Morton Davison by virtue of his (Davison's) will. And after the decease of the said Morton John Eden, the testator devised his said estates, upon the conditions aforesaid, to the first and other sons of the said Morton John Eden, severally and successively, and to the heirs of their respective bodies; and in default of such issue, he devised the said estates, upon the like condition as aforesaid, to the third and every other son of his said daughter, to be begotten, severally and successively, and the heirs of their respective bodies; and the testator declared, that if the said Morton John Eden, or any son of his said daughter, should at any time during his life become seised of the real estates devised by the said Morton Davison, then the said Morton John Eden, or such son of his said daughter so becoming entitled, or any heir of his body, should not take any interest in any of his the said testator's estates, but the same should go over to, and be enjoyed by the next son of his said daughter and the heirs of his body, with a clause, however, for revesting the estates in the son so displaced, on certain contingencies therein specified. And then comes the proviso, on which the question for our decision turns: "Provided always, that if it shall happen that my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled by the true meaning of this my will to my real estates hereby limited

and settled as aforesaid, then and in either of those cases I devise all my said *real estates*, subject respectively as aforesaid, to all the daughters, if more than one, of the body of my said daughter, who shall be living at her death, as tenants in common, and their heirs respectively, with cross remainders amongst them, in case of any one or more of them happening to die under the age of one-and-twenty years, and without issue; and if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs; provided always, that if any such daughter or daughters of my said daughter shall happen to die in her or their said mother's lifetime leaving issue, then my will is that such issue of each such daughter so dying, and the heirs of such issue respectively, shall have and take the estate, or share or shares of estates, as the parent or parents of such issue respectively would have been entitled to if she or they had been living at the decease of my said daughter; and in case my said daughter shall have no issue of her body living at her death, then I devise all such my real estates, from and after the determination of the particular estates hereinbefore thereof limited as aforesaid, to such person or persons, and for such estate and estates, either in fee simple or otherwise, and in such manner as my said daughter, whether married or sole, shall by any deed or deeds executed in the presence of two credible witnesses, or his or her last will and testament in writing, or any writing in the nature of a will, signed in the presence of three such witnesses, direct or appoint; and for want of any such appointment, and subject thereto, and to the several limitations and charges in this my will, I leave all such real estates to descend to my own right heirs."

The testator's daughter Lady Eden died in the year 1792, in her father's lifetime, leaving her two sons, Robert Eden and Morton John Eden, named in the will, and

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several daughters, of whom the plaintiff is one. She never had any other son.

The testator died in 1796, and on his death his widow entered on and was possessed of all the real estates devised by the will until her death, which occurred in 1810. Upon her death the testator's grandson Robert Eden, who had then become Sir Robert Johnson Eden, entered on the property devised to him by his grandfather's will, and continued seised thereof till his death, on the 4th of September, 1844. His brother, Morton John Eden, died before him, in the year 1841, and neither of the brothers ever had any issue.

On the death of Sir Robert Johnson Eden, the plaintiff, who is one of his sisters, filed a bill in the Court of Chancery claiming certain interests under the will of the testator, Peter Johnson. The cause came on to be heard before the Master of the Rolls, who directed a case to be stated for the opinion of this Court, whether the daughters of Lady Eden, or any of them, took any estate or interest in the lands devised by the said Peter Johnson.

The question turns entirely on the construction to be given to the proviso to which we have already referred. At the death of the testator's daughter, her two sons, Robert and Morton John, were living, so that she certainly then had issue male who would become entitled, under the limitations of the will, to the whole of the devised estates, subject only to the prior life estate given by the testator to his wife. If, therefore, the gift to daughters of Lady Eden, the testator's daughter, was contingent, depending on the event of her having no such issue male at her decease, then they certainly took nothing, for there was such male issue at the daughter's death in 1792, and it failed only on the death of Sir Robert Johnson Eden, in 1844.

But on behalf of the plaintiff, who, in the argument before us, represented all the daughters, it was contended that

this is not the true construction of the proviso. The proviso, it was said, is divisible into two parts, and the estate is given to the daughters upon either of the two contingencies; first, if my daughter shall have no issue male living at her death, and secondly, if she shall have no such issue male as shall be entitled by the true meaning of the will to the real estates devised. Though the first contingency did not happen, for the daughter had at her decease issue male, yet it was argued that the second contingency did happen on the death of Sir Robert Johnson Eden without issue in 1844, for then the daughter had no issue male at all, and therefore certainly no such issue male as should be entitled by the will to the devised estates. And this might be a sound distinction, if, as was argued for the plaintiff, the failure of issue male entitled under the will, and referred to in the second member of the sentence, is not a failure at the daughter's death, but a general failure at any time. In such case it might perhaps reasonably be argued, that though in form a proviso, the words would be in truth but a continuation of the previous line of devise, and would amount to no more than a gift to the daughters of the remainder expectant on the failure of the heirs of the body of the sons to whom the estate had been previously given. But we cannot so read the clause. It appears to us, that the failure of issue male referred to in the second member of the sentence, no less than in the first, is a failure at the death of Lady Eden. The sentence would grammatically bear either construction; but by far the most reasonable and obvious one is that which connects the words "*living at her death*" with both members of the sentence, making the verb not simply "*shall have*," but "*shall have living at her death*."

There is no verb at all in the second member of the sentence, and it is therefore necessary to import one from what precedes. The plaintiff contends that the verb to be imported is merely *shall have*, whereas the defendants argued that the further words *living at her decease* must also be

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introduced, and we concur in this latter view of the case. If in the former part of the sentence the words *living at her death* had preceded the words *no issue male of her body*, there would have been no doubt on the subject, and we do not think that the mere difference of collocation makes any real difference in the construction. The words "*living at her death*," may with perfect grammatical accuracy be connected with the verb "*shall have*," and not with the phrase "*no issue male*," and unless they are so connected, the words "*shall have*" ought certainly, in strict accuracy of language, to have been repeated in the second member of the sentence.

There are two considerations suggested by the context, confirmatory of our view of the case.

In the first place, unless our construction be adopted, the first member of the proviso is wholly nugatory and inoperative.

If under the second branch of the sentence the estates are, as is contended by the plaintiff, to go over to the daughters whenever there should be, at any period however distant, a failure of a particular class of issue male, it was absurd to provide also that they should go over if there was a total failure of all issue male at the death of a particular person, for such contingency was necessarily included in and provided for by the other limitation.

The other circumstance on which we rely, is the power of appointment given to the daughter Lady Eden. The testator first provides for the sons of his daughter, then for her daughters living at her death, or the issue of predeceased daughters; but it occurred to him that she might have no such daughters, or issue of predeceased daughters, and in that event he gives her an absolute power of disposal over the whole estate. It is surely reasonable to suppose that this power was to be exercised by way of substitution for the gift to the daughters or their issue, if there had been any capable of taking, and so that, if there should be no daughter, it was to be exercised on the happening of the same events

as would have entitled the daughters if there had been any. Now it is certain that the power of appointment could not arise unless there was a failure of issue, male as well as female, at the death of Lady Eden. This, though not conclusive, seems to us strongly confirmatory of our construction of the proviso.

We may further observe, that an heir-at-law is not to be disinherited, unless his ancestor has by plain words given the property away from him; and here the most which the daughters can possibly contend for against the heir-at-law is, that the testator has used expressions capable of two constructions, according to one of which—and that not as we think the most natural—they would be entitled.

On these grounds we are of opinion, that the estate of the daughters was only to arise in the event of a failure at the death of Lady Eden of issue male entitled under the will; and as this event did not occur, we shall certify our opinion that the daughters of Lady Eden took no estate or interest under the will of Peter Johnson.

A certificate was afterwards sent to the Master of the Rolls in accordance with this opinion.

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Jan. 31.

The GOVERNOR and COMPANY of the BANK of SCOTLAND v. FENWICK.

(Before ROLFE, B., sitting alone.)

The Court quashed a writ of sci. fa. on a judgment recovered against the public officer of a banking copartnership, which alleged that the defendant was a member "at the time of the commencement of the action in which the judgment was obtained, and at the time of the recovery and giving of the judgment, and from thence continually has been and still is a member."

THIS was a rule calling on the plaintiffs to shew cause why a writ of sci. fa., in the following form, should not be quashed:—"Victoria, by the grace of God &c., to the Sheriffs of London greeting. Whereas the governor and company of the Bank of Scotland lately, on the 21st day of September, in the year of our Lord 1847, in our Court before the Barons of our Exchequer, at Westminster, under and by virtue of the statute in such case made and provided, by the judgment of the same Court, recovered against George Burdis (as and being one of the public registered officers, for the time being, of certain persons united in copartnership and carrying on the trade or business of bankers, in England, by and under the name and style of and called the North of England Joint-stock Banking Company, for the purpose of carrying on the business of bankers in England, under the provisions of a certain act of Parliament, passed in the 7th year of the reign of his late Majesty King George the Fourth, for, amongst other things, the better regulating copartnerships of certain bankers in England, and which said George Burdis had been duly nominated, appointed, and registered one of the public officers of the said copartnership to be sued, and was then sued as the nominal defendant for and on behalf of the said copartnership, according to the form and effect of the said act of Parliament) 66,536*l.* 7*s.* 2*d.*, for their damages which they had sustained, as well on occasion of their not performing certain promises before then made by the said copartnership to the said governor and company of the Bank of Scotland, as for their costs and charges by them about their suit in that behalf expended, whereof the said George

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Burdis, as public officer as aforesaid, is convicted, as by inspecting the rolls of the said Exchequer appears of record; And whereas, by and according to the provisions and the form and effect of the said statute, execution upon any judgment in any action obtained against any public officer for the time being, of any such copartnership as in the said act mentioned, carrying on the business of banking under the provisions of the said act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such copartnership; and now on behalf of the said governor and company of the Bank of Scotland, in the same court, we have been informed and given to understand, that, although judgment be thereupon given, yet execution of the said damages still remains to be made to the said governor and company of the Bank of Scotland, and that Cuthbert Smith Fenwick, *at the time of the commencement of the said action, in which the said judgment was so obtained as aforesaid, and at the time of the recovery and giving of the said judgment, was, and from thence continually has been and still is, a member of the said copartnership called 'The North of England Joint-stock Banking Company,' then and still being such a copartnership as in the said statute mentioned, and then and still carrying on the business of banking under the provisions of the said statute, wherefore the said governor and company of the Bank of Scotland have humbly besought us to provide them a proper remedy in this behalf; and we being willing that what is just in this behalf should be done, command you that by honest and lawful men of your bailiwick you make known to the said Cuthbert Smith Fenwick that he come before the Barons of our said Exchequer, at Westminster, on the 18th day of November, A. D. 1847, to shew if he has or knows of anything to say for himself, why the said governor and company of the Bank of Scotland ought not to have execution against him the said Cuthbert Smith Fenwick, for the damages aforesaid, together with interest*

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thereon at the rate of £4 per cent. per annum from the said 21st day of September, 1847, on which day the judgment aforesaid was entered up, according to the force, form, and effect of the said recovery, and of the statute in such case made and provided, if it shall seem expedient for them so to do; and in what manner you shall execute this our writ, make appear to the Barons of our said Exchequer, at Westminster, on" &c.

Sir *John Bayley* shewed cause.—The case of *Esdale v. Trustwell* (a) is relied on by the other side; but there the Court came to no decision on the point, the plaintiffs' counsel having consented to amend. The objection, in truth, is not that the writ gives the defendant insufficient notice, but that it gives him too much. [*Rolfe*, B.—If the words "member for the time being," in the 13th section of the 7 Geo. 4, c. 46, mean a member at the time the writ of sci. fa. issued, then the writ states two grounds of liability.] In no case is the leave of the Court necessary, except where the party has ceased to be a member. The 12th section of the statute declares that a judgment against the public officer shall have the like effect and operation upon and against the property of the copartnership and the property of every member thereof, as if such judgment had been recovered against such copartnership. If the writ had shewn upon the face of it that the defendant had ceased to be a member of the copartnership, then it would have appeared that the leave of the Court was necessary. In the absence of any affidavit to shew that the defendant had ceased to be a member, this is the true description.

Willes, in support of the rule.—In *Bradley v. Warburg* (b), it was held that the issuing a sci. fa. without leave of the Court could not be pleaded as a defence in bar of the action, but was an irregularity merely, for which an appli-

(a) Ante, p. 371.

(b) 11 M. & W. 254.

cation might be made to the Court to set aside the writ. If the defendant was a member at the time of the judgment, and had ceased to be so, the writ could not issue without leave of the Court. Whatever construction is put upon the words "member for the time being," whether it means "member at the time the sci. fa. issued," or "at the time of the commencement of the suit," the present writ is irregular. Suppose the defendant was in fact a member at the time of the judgment, and not a member "for the time being," and a declaration is delivered following the form of the writ, the defendant by his plea must deny that he was a member at the time of the judgment, and also that he was a member "for the time being." The plaintiff would prove that the defendant was a member at the time of the judgment, though not for the time being; and the result would be, that the plaintiff would have the benefit of a writ issued without the leave of the Court, in a case in which the leave of the Court is required. It was on that ground that the writ was quashed in the case referred to by *Parke, B.*, in *Esdaille v. Trustwell*.

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ROLFE, B.—The rule must be absolute. The principle of the case of *Esdaille v. Trustwell* governs this. The statute enables the plaintiff, without leave of the Court, to issue a sci. fa. against a member for the time being; and, for the purpose of disposing of this question, I will assume that the words "time being" mean at the time the writ issues, for I think it makes no difference whether it mean at that time, or at the time of the commencement of the suit. The statute also enables a plaintiff to have execution against a person who was a member of the copartnership at the time of the judgment recovered; but in that case the leave of the Court is necessary before issuing the writ, and also if he had ceased to be a member before the sci. fa. issued. Here the sci. fa. describes the defendant as a member for the time being, and also at the time of judgment recovered.

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The declaration would be in the same form, but no advantage could be taken of the defect in the writ by demurrer to such a declaration; and if the defendant took issue on it, and pleaded that he was not a member "at the time of judgment recovered" or "for the time being," and it should turn out at the trial that the defendant was a member at the time of the judgment recovered, though not for the time being, the plaintiff would be entitled to execution, although the writ had issued without leave of the Court.

Rule absolute, with costs.

Jan. 15.

ATKINSON v. POCKOCK.

In an action by an allottee in a projected railway, upon the failure of the scheme, for the recovery of his deposit, where he had executed the usual subscribers' deed, there being no evidence that such execution was obtained by fraud, the defendant, under the direction of the judge, obtained a verdict:—
Held that, as the plaintiff should have been nonsuited, a rule for a new trial ought not to be granted, although some observations made by the learned Judge to the jury, as to what would constitute fraud, might not be legally correct; but in such a case the Court will grant a rule to enter a nonsuit.

ASSUMPSIT for money had and received. Plea, non assumpsit.

At the trial, before *Pollock*, C. B., at the London sittings after Michaelmas Term last, it appeared that the plaintiff was an allottee in the Sheffield and Macclesfield Railway Company, and that the present action was brought against the defendant, who was a member of the provisional and managing committee, to recover the amount of deposit paid by the plaintiff upon the shares allotted to him in the company. The capital of the company was to consist of 400,000 shares. An advertisement had been inserted in the papers, stating that no application for shares would be entertained from parties residing in the metropolis after Saturday, the 11th of October, 1845, nor from persons residing in the country after the following Monday. Applications for about 300,000 shares had been made, and about 18,000 were allotted upon the 18th of that month. There were fourteen directors of the company, who had the disposal of 500 shares each, and these were included in the above allot-

to the jury, as to what would constitute fraud, might not be legally correct; but in such a case the Court will grant a rule to enter a nonsuit.

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ment. Deposits were paid on 9085 shares, and the defendant paid his deposit on the 4th of November, when he signed the usual subscribers' deed. There was some evidence that at subsequent times means were taken by the directors to enhance the value of the shares in the market by what is called "rigging the market." The Lord Chief Baron told the jury, that if the scheme was a *bonâ fide* scheme, although it might be a wild speculation, there was no sufficient evidence of fraud to vitiate a contract under seal, and that such was his opinion in point of law; and if the jury thought that no fraud had been exercised in order to make the plaintiff execute the deed, they should find a verdict for the defendant. His lordship also observed to the jury, that, in his opinion, no amount of misrepresentation, short of *actual swindling*, would be sufficient to avoid the deed, and that such a fraud must be traced to the defendant himself, and the misrepresentations of his co-directors would not be sufficient to fix him with fraud. The jury found a verdict for the defendant.

Humfrey now moved for a new trial, on the ground of misdirection.—The plaintiff is entitled to a new trial, for the jury were misdirected in two respects: in the first place, a fraud may be committed without an act which amounts to swindling; and secondly, a fraud may be committed by means of an agent. [*Parke, B.*—In *Hern v. Nichols (a)*, *Holt, C. J.*, "was of opinion that the merchant was answerable for the deceit of his factor, though not criminaliter, yet civiliter; for, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser, than a stranger." He also referred to *Cornfoot v. Fowke (b)*. *Alderson, B.*—There was no evidence whatever of fraud to go to the jury, and therefore the plaintiff ought to have been nonsuited.

(a) 1 Salk. 289.

(b) 6 M. & W. 358.

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Such being the case, the observations which were made to the jury become immaterial. *Parke, B.*—I do not see the least evidence of fraud, and the learned Judge left it to the jury whether the scheme was *bonâ fide* or not.]

PER CURIAM (a).—The verdict for the defendant may be set aside if the plaintiff wishes, and he may have a rule to shew cause why a nonsuit should not be entered; otherwise there will be no rule.

Rule accordingly.

(a) *Pollock, C. B., Parke, B., Alderson, B., Platt, B.*

Jan. 15.

VANE v. COBBOLD.

In an action by an allottee of a railway company for the recovery of his deposit, it appeared that the company issued a prospectus, which stated the capital to consist of 60,000 shares of £25 each, and the plaintiff, after having paid his deposit, executed the subscribers' agreement, which contained the usual terms as to the disposition of the deposits: at the time when he executed the deed, the deposits upon 18,160

ASSUMPSIT for money paid, had, and received, and on an account stated. Plea, non assumpsit.

At the trial, before *Pollock, C. B.*, at the London sittings after last Michaelmas Term, it appeared that the plaintiff was an allottee in the Midland and Eastern Counties Railway Company, of which the defendant was one of the managing committee. In 1845, the company was established for the purpose of making a railway from Cambridge to Worcester. A prospectus was issued, which stated that the capital of the company was to consist of 60,000 shares of £25 each. The plaintiff, on the 1st of October, received the letter of allotment, requiring him to pay the deposit on or before the 16th inst., in default of which the allotment was to be cancelled. 35,000 shares only had been allotted, and upon 18,160 only of these had the deposits been paid. The plaintiff afterwards, on the 4th of November, executed the subscribers' deed, which was in the usual form. The shares only had been paid, although 35,000 shares had been allotted, which fact was not communicated to him:—*Held*, that the withholding of the above fact did not amount to such a fraud as to avoid the deed, and that the plaintiff was not entitled to recover back his deposit.

bill of the company did not pass the House of Lords, the committee having decided that the preamble was not proved. It was thereupon contended, on the part of the plaintiff, that he should have been informed of the fact that only a portion of the deposits had been paid when he signed the deed, and that the suppression of that fact amounted to such a fraud as was sufficient to avoid the deed. The Lord Chief Baron, however, thought there was no evidence of fraud, and directed a nonsuit.

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Martin now moved to set aside the nonsuit, and for a new trial.—The plaintiff would have been entitled to recover back his deposit in this case: *Nockolls v. Crosby* (a), *Walstab v. Spottiswoode* (b), unless he had executed the subscribers' agreement: *Garwood v. Ede* (c). Now in the present case the deed is void; for, at the time the plaintiff signed it, there was a material fact suppressed; for the deposit upon 18,160 shares only had then been paid, out of 60,000, the proper number, and the capital upon the remaining shares could not be obtained, as all allotments on which the deposits were not then paid were void. The plaintiff should have been informed of this fact; and this is such a fraudulent concealment of material facts, or suppressio veri, as is equivalent to an allegatio falsi. [*Alderson*, B. —In these cases persons frequently begin to sign the deeds long before the deposits are all paid. The directors might honestly suppose that other names would come in afterwards.]

PER CURIAM (d).—There is no ground for a rule in the present case.

Rule refused.

(a) 3 B. & C. 814.

(b) 15 M. & W. 501.

(c) Ante, 284.

(d) *Pollock*, C. B., *Parke*, B.,
Alderson, B., *Platt*, B.

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Jan. 28.

LEY v. BARLOW.

Where an action was brought by an allottee in a railway company, for the recovery of his deposit, against a member of the managing committee, and it appeared by affidavit that the subscribers' agreement and parliamentary contract had been signed by the plaintiff and defendant, and was in the hands of the solicitor to the company and to the defendant; and that an inspection and copy of those documents was necessary for the purpose of proving the plaintiff's case:—*Held*, that the plaintiff had a right to such inspection and copy.

IN this case a rule had been obtained, calling on the defendant and his attorney to shew cause why the plaintiff or his attorney should not be at liberty to inspect and take copies of the parliamentary contract and subscribers' agreement of the Grand Junction and Midlands Union Railway Company. This was an action by the plaintiff, an allottee in the above company, to recover the amount of his deposit upon certain shares in the undertaking.

The affidavits in support of the application stated, that the defendant had acted as one of the managing committee of the company, and had executed the parliamentary contract and subscribers' agreement, both as a shareholder and as a member of the managing committee; that the deponent believed that the deeds in question were in the possession or control of the defendant jointly with the other directors, or of Messrs. Edwards & Mason, the attorneys for the defendant, and that the said attorneys claimed a lien on the said deeds for their charges to the company; that it would form part of the plaintiff's case that the defendant had signed the said deeds, but that deponent was unacquainted with the particulars of the contents of the said deeds, and that he was advised and believed that an inspection and copy of them were necessary for the purpose of framing the plaintiff's case, and that the plaintiff could not safely proceed in the action without such inspection and copy. The defendant's affidavits stated, that he did not consider himself a party to the deeds in any other manner than the plaintiff was a party to the same, and that up to a certain time he was not concerned in the management of the company, and that the deeds were not in his possession.

Bramwell now shewed cause.—The plaintiff is not entitled to inspect these documents. No agreement can be implied

that the defendant is to produce them when required, as there is no stipulation to that effect in the deeds. [*Parke*, B.—A person who is one of the managing committee of a company of this description, and undertakes to settle the affairs of the company, is in possession of a deed by which those affairs are regulated. All the parties to that deed have *prima facie* a right to inspect it, as it is not private property.] In the next place, the defendant's attorney has a lien on these documents, which is a sufficient reason why this application should be refused. In *Kemp v. King* (a), it was held by *Denman*, C. J., that a witness might refuse to produce a document under a subpoena duces tecum, if as against the party asking its production the witness had a lien on the document which was called for. [*Parke*, B.—The lien cannot defeat the right to inspect the documents. The case of *Hunter v. Leathley* (b) was a solemn decision to this effect,—that a broker who has effected a policy and has a lien on it for his premiums, may be compelled by the assured to produce it on the trial of an action against the underwriters.] Lastly, this application should be made on reasonable grounds, and not for the mere purpose of obtaining evidence. The reason here given, “for the purpose of framing the plaintiff's case,” is not sufficient.

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Willes, contra, was not called upon.

PER CURIAM (c).—We think the rule ought to be made absolute. The case of *Steadman v. Arden* (d) is in point.

Rule absolute.

(a) 2 Moo. & Rob. 437; Car. & M. 396.

(b) 10 B. & C. 858.

(c) *Pollock*, C. B., *Parke*, B., *Alderson*, B., *Platt*, B.

(d) 15 M. & W. 587.

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In re KNIGHT, in a Plaint of Gwynne v. Knight.

By a local act of Parliament for rebuilding a certain church, trustees were empowered to levy rates upon all houses in the parish, one half to be paid by the landlord, and the other half by the tenant; the tenants to pay the whole rate in the first instance, and to deduct a moiety out of the rent; and that every landlord should allow of such deduction accordingly, *notwithstanding any agreement to the contrary*. After the passing of this act, a lease was granted in the parish to a tenant, who covenanted to pay all parliamentary and other taxes and rates. The tenant paid the full rent and the rate, but the landlord refused to deduct a moiety of it from the plaintiff, on the ground that the act only applied to agreements in existence at the time it was passed.

The tenant having sued the landlord in a county court for a moiety of the amount so paid for rates:—*Held*, that, as no question was raised as to "the title to any corporeal or incorporeal hereditaments," within the 58th section of the stat. 9 & 10 Vict. c. 95, there was no ground for a writ of prohibition.

Semble, per *Parke, B.*, that the act applied only to agreements entered into before it came into operation.

H. HILL moved for a rule, calling on the judge of a county court to shew cause why a writ of prohibition should not issue, directed to the judge of the court, to prohibit the Court from further proceeding in the plaint. The facts, as stated in the affidavits, appeared to be as follows:—

By the 39th section of the statute 57 Geo. 3, c. 72, intituled "An act for rebuilding the church and improving the churchyard of the parish of Saint Paul, Shadwell, in the county of Middlesex," (which is a local and personal act), it is enacted that certain trustees shall be authorised to make rates on all houses, &c., one half on the landlords, and the other half on the tenants or occupiers. The 40th section enacts, "that every tenant or occupier of the rated premises shall first pay the whole rate made in respect of the premises in his or her possession, by virtue of this act, and thereafter be entitled to deduct out of the rates payable to his or her landlord one moiety of such rates; and every intermediate tenant, in the cases of underleases or lettings shall in like manner be entitled to deduct or retain such proportion of the said rate out of his or her particular rent, payable to his or her immediate landlord, as the rated rent charged by the trustees herein shall bear to the rack-rent payable by such intermediate tenants as aforesaid; and that every such landlord shall allow of such deduction accordingly, *notwithstanding any agreement to the contrary*; and that the production of the receipt-stamps shall be taken as payment of so much of the rents." After the passing of the last-mentioned act, the plaintiff entered into a lease

with the defendant, as tenant of certain premises situated in the parish, and by the lease the plaintiff covenanted to pay parliamentary and all other taxes. The plaintiff paid all the rates and eighteen months' church-rate, and applied to the defendant for repayment; the defendant refused, on the ground that the clause, "notwithstanding any agreement to the contrary," only applied to agreements made before the passing of the local act. The plaintiff therefore issued a plaint against the defendant in the county court for the sum of 7*l.* 10*s.*, as for money paid to the defendant's use, that sum being half the amount of the church-rate. The judge of the county court doubted whether he had any power to try the question, as being a case within the proviso of the 58th section of the statute 9 & 10 Vict. c. 95, which enacts, that "all pleas of personal actions, where the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise, may be holden in the county court without writ; and all such actions brought in the said court shall be heard and determined in a summary way in a court constituted under this act, and according to the provisions of this act: provided always, that the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed," &c. [*Parke*, B.—The words in the local act may be reasonably construed to mean, notwithstanding any agreement subsisting between the parties at the time of the passing of that act. The parties could not foresee that the expense of building a church would be imposed upon the parish. But if the agreement is made after the passing of the act, then the party who enters into the agreement has no good ground for not paying these expenses. Here no question as to the landlord's title comes in question, for that is admitted;

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nor any title to any corporeal or incorporeal hereditament.]

POLLOCK, C. B.—I do not think any rule ought to be granted in the present case.

PER CURIAM (a).—We cannot grant a rule.

Rule refused.

(a) *Pollock, C. B., Parke, B., Alderson, B., Platt, B.*

Jan. 19.

SPOTSWOOD v. BARROW and Another.

ASSUMPSIT.—The first count of the declaration stated, that heretofore, to wit, &c., by a certain agreement then made between the plaintiff and the defendants, it was agreed in manner following, (that is to say): the plaintiff agreed with the defendants to travel and act as salesman, as occasion might require, for the defendants, for one year, to devote the whole of his time as traveller, and not to be connected in any way with any other house in disposing of their goods; and the defendants thereby agreed to pay the plaintiff the sum of £200 per annum for such servitude. Averment of mutual promises, and general performance by the plaintiff; and that the plaintiff did afterwards, to wit, on the day and year aforesaid, enter into the employ of the defendants, in the capacity aforesaid, and on the terms aforesaid, and did continue in the employ of the defendants in house, and had always, until the expiration of one year from the said agreement, been ready and willing, and offered to remain in such employ, and not to be connected with any other house. Breach, that defendants would not suffer plaintiff to act as salesman for the remainder of the year, but discharged plaintiff, and had not paid the £200. The defendants pleaded, as to the non-payment of the £200, that, after plaintiff ceased to be in defendants' employ, and during the year, plaintiff entered into the service of the house of certain other persons, and became connected with it in disposing of their goods: Verification:—*Held* bad, on special demurrer, as an argumentative denial of the plaintiff's readiness and willingness to remain in defendants' employ.

the capacity aforesaid, and on the terms aforesaid, and did travel and act as salesman, as occasion required, for the defendants, and did devote the whole of his time as traveller, and was not connected in any way with any other house in disposing of their goods for a long space of time, to wit, from the time of the making the said agreement until a day before the expiration of one year from the time of the making the said agreement and the commencement of the said service, to wit, on &c.; and although the plaintiff was, on the day and year last aforesaid, and hath always, from thence until the expiration of the said period of one year from making of the said agreement and the commencement of the said service, been ready and willing, and then offered to remain and continue in such employ of the defendants in the capacity aforesaid, and on the terms aforesaid, and to travel and act as salesman, as occasion might require, for the defendants, and to devote the whole of his time as traveller, and not to be connected in any way with any other house in disposing of their goods for the remainder of the said year, of all which the defendants, during that time, had notice, yet the defendants did not nor would continue the plaintiff in their the defendants' said employ, nor did nor would they suffer or permit the plaintiff to travel or act as salesman, in manner aforesaid, for the defendants, or in any other manner, from the day and year last aforesaid during the remainder of the said period of one year, and they wholly discharged the plaintiff from the further performance of the said agreement on his part during the residue of the said period of one year; and although the said period of one year had elapsed before the commencement of the suit, yet the defendants have not paid the plaintiff the said sum of £200 for the period of one year.

Fourth plea, to the first count, so far as the same relates to the said supposed breach of promise by the defendants in not paying to the plaintiff the said sum of £200 for the said period of one year, as in the said first count alleged,

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that after the plaintiff ceased to be in the employ of the defendants, as in the said first count mentioned, and during the said period of one year therein mentioned, and long before the expiration of the said period, to wit, on &c., the plaintiff entered into the service and employ of a certain other house than the house of the defendants, to wit, the house of &c., for a certain salary, and was connected with the said last-mentioned house in disposing of their goods, and continued so connected therewith, to wit, for and during all the remainder of the said period of one year: Verification.

Special demurrer, assigning for causes, that the said plea does not directly, nor in a legal or proper manner, traverse or confess and avoid the cause of action in the first count mentioned; that, if the said plea is to be taken as a plea of denial, then the same is a mere argumentative denial of so much of the first count as alleges that the plaintiff was ready and willing, and offered to remain and continue in the employ of the defendants, and to travel and act as a salesman for the defendants, and to devote his whole time as traveller, and not to be connected with any other house in disposing of their goods during the time in this first count in that behalf mentioned. But if the said plea is to be taken as a plea in confession and avoidance, then it is bad, inasmuch as it confesses that the defendants wholly discharged the plaintiff from the further performance of the said agreement on his part, from and after the time when the plaintiff ceased to be in the employment of the defendants, as in the first count mentioned; and if the plaintiff was so discharged from the further performance of the agreement on his part, then the fact that the plaintiff did enter into the employ of another house after such discharge is no sufficient excuse for the non-performance of the contract on the part of the defendants.

Joinder in demurrer.

One of the defendants' points was, that the declaration

is bad, because the cause of action therein declared on is the non-payment of the stipulated salary of £200, for which the claim is entire, and such stipulated salary can be claimed only as upon an executed contract, and it appears from the count itself that the contract is not executed.

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Hugh Hill, in support of the demurrer.—The plea is clearly bad, as amounting to an argumentative traverse of a material allegation in the declaration. The plaintiff was improperly dismissed by the defendants; that being so, it is perfectly immaterial whether or not he entered into any other employment. The plea contains a confession, but does not avoid the cause of action.—He referred to *Aspden v. Austin* (a), and *Dunn v. Sayles* (b). He was then stopped by the Court, who called upon

T. Jones to support the plea.—In the first place, the declaration is bad. The claim is rested upon the defendants' refusal to continue the plaintiff in their employment; and he has not any remedy for the whole £200, although he may have for the services he has rendered. Suppose a person contracts to build a house, and the other party to the contract prevents him from completing it; the builder is not entitled to receive the whole sum for which he engaged to perform the work. Secondly, the plea is good. The contract in effect is, that the plaintiff will not injure the plaintiff's business by interfering in the management of any other house of business. [*Alderson*, B.—How could the plaintiff be ready and willing not to be connected with any other house, when he was connected with another house? How can a person be ready and willing to do what he cannot do?]

PARKE, B.—I am of opinion that the plaintiff is entitled

(a) 5 Q. B. 671.

(b) 5 Q. B. 685.

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to judgment. The plea is bad on special demurrer, as being an argumentative denial of the plaintiff's readiness and willingness to remain in the defendants' employ; for it states that he has connected himself with another house. The plea is not in confession and avoidance, but amounts to an argumentative denial of a material and traversable allegation in the declaration.

ALDERSON, B.—This plea is clearly an argumentative denial of the plaintiff's readiness and willingness to continue in the defendants' employment. The proper mode of pleading would have been to have traversed that allegation. The plea states, that the plaintiff entered into the employ of another house, and became connected with that house in disposing of their goods. It follows from that, argumentatively, that the plaintiff was not ready and willing, as alleged in the declaration, to continue in the defendants' service.

PLATT, B., concurred.

Judgment for the plaintiff.

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LATTIMORE v. GARRARD.

Jan. 19.

ASSUMPSIT. The declaration stated, that whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, had become and was tenant to the defendant of a certain farm, to wit, as tenant thereof to the defendant from year to year, for so long time as the plaintiff and the defendant should respectively please, at a certain yearly rent therefore payable by the plaintiff to the defendant, to wit, &c., and upon the following amongst other terms and conditions, that is to say, that if the plaintiff should receive from the defendant notice to quit the said farm, and should, during his said tenancy, have made expensive improvements to or upon the said farm, for which improvements the subsequent crops of and from the said farm during the said tenancy should not have sufficiently compensated the plaintiff before the determination of his said tenancy, the said farm should, upon the determination of the said tenancy, be looked over by two sufficient men of business, one to be appointed by each party, and that the persons who should be so appointed as aforesaid should determine to what further compensation in that behalf the plaintiff should be entitled; the defendant thereupon then promised the plaintiff, that if the plaintiff's said tenancy should be determined in manner aforesaid, and the plaintiff should have made such improvements as aforesaid, for which he should not have been sufficiently compensated as aforesaid, he, the defendant, would, at the request of the plain-

A declaration in assumpsit stated, that, in consideration that the plaintiff had become tenant to the defendant of a farm, upon the terms that if the plaintiff should receive from the defendant notice to quit, and should have made expensive improvements upon the farm, for which the subsequent crops should not have compensated the plaintiff, the farm should, on the determination of the tenancy, be looked over by two persons, one to be appointed by each party, and that the persons so appointed should determine to what compensation the plaintiff should be entitled; and that the defendant promised the plaintiff, that if the tenancy

should be determined and the plaintiff should have made improvements, for which he should not have been compensated, the defendant would, at the plaintiff's request, appoint a person for such purposes. Averment, that the tenancy was determined by the defendant; that the plaintiff had made improvements for which he had not been compensated; that the plaintiff, after the determination of the tenancy, appointed J. D. to determine the compensation, and J. D. was ready to act, of which the defendant had notice, and was then requested by the plaintiff to appoint some person on his behalf:—*Held*, on special demurrer, that the declaration was bad, as stating a promise which did not legally arise from an executed consideration; and also on the ground that there was no allegation that the plaintiff had requested the defendant to appoint a valuer before the commencement of the suit.

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tiff, appoint one of such persons as aforesaid, for such purpose as in that behalf aforesaid. Averment, that the plaintiff continued such tenant as aforesaid for a long time, to wit, &c., when the said tenancy was determined by and according to a notice theretofore given by the defendant to the plaintiff to quit the said farm at that time, to wit, on &c.; and that the plaintiff during his said tenancy, to wit, on &c., and on divers other days and times between that day and the determination of the said tenancy, made divers expensive improvements to and upon the said farm, the expense of which said improvements amounted in the whole, to wit, to £2000; and that the plaintiff had not during his said tenancy, or before or at the time of the determination thereof, been sufficiently compensated by the subsequent crops of and from the said farm, during the said tenancy, for such improvements so made by him as aforesaid, but that such compensation to him therefore was and is deficient in that behalf to a large sum, amounting, to wit, to £1000; and although the plaintiff afterwards, and upon the determination of the said tenancy, to wit, on &c., appointed and procured a certain person, to wit, one J. D., he being a sufficient man of business in that behalf, to be one of the persons to look over the said farm, and to determine to what further compensation as aforesaid the plaintiff was entitled; and the said J. D. was then and hath been from thence hitherto ready and willing to act in that behalf; of all which the defendant then had notice, and was then requested by the plaintiff to appoint and procure on his the defendant's part, for the purpose aforesaid, some proper person in that behalf as aforesaid, to wit, &c.; yet the defendant did not nor would, when he was so requested as aforesaid, or at any time, appoint or procure any person for the purpose aforesaid, to wit, to be and act as one of such persons as aforesaid, but wholly neglected so to do, whereby the plaintiff hath lost the sum of £1000, &c.

Special demurrer, assigning for causes, that it does not

appear by the said declaration that the said person so appointed and procured by the plaintiff, as in the declaration mentioned, was appointed and procured by the plaintiff before the commencement of the suit, or that the said person was appointed and procured by the plaintiff such a reasonable time before the commencement of the suit as would have enabled the defendant to have appointed and procured another person on his, the defendant's, part, for the purposes in the said declaration mentioned; and for that it does not appear that the defendant had notice of the said appointment and procurement of the said person before the commencement of the suit, or that such notice was given by the plaintiff to the defendant within such a reasonable time before the commencement of the suit as would have enabled the defendant to have appointed and procured another person on the defendant's part, for the purposes in the declaration mentioned; and that it does not appear that the defendant was requested by the plaintiff to appoint and procure, on the defendant's part, for the purposes in the declaration mentioned, a proper person in that behalf, before the commencement of the suit; and that there does not appear, in and by the said declaration, any sufficient consideration to support the promise therein alleged to have been made by the defendant. Joinder in demurrer.

Ogle, in support of the demurrer.—The declaration is clearly bad, for the reasons assigned by the special demurrer. [*Parke*, B.—The declaration states a bygone consideration. The question is, whether the defendant's promise is correctly stated. Where the consideration is an executed one, no promise can be stated except that which is implied by law to arise from it. It does not appear that the defendant was requested by the plaintiff, before the commencement of the suit, to appoint a valuer, for the purpose of ascertaining to what amount of compensation the plaintiff was entitled

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at the determination of the tenancy.] The Court then called upon

Cowling, contra, who admitted the difficulty.

PER CURIAM (a).—The plaintiff may amend on payment of costs, otherwise there must be

Judgment for the defendant (b).

(a) *Parke, B., Alderson, B., & W.* 241; *Keye v. Dutton*,
Rolfe, B., Platt, B. 7 Man. & Gr. 807; *Roscorle v.*

(b) See *Hopkins v. Logan*, 5 M. Thomas, 3 Q. B. 234.

Jan. 16.

ENTWISLE and Another v. DENT and Others.

The plaintiffs,
 merchants in
 England, con-
 signed to the de-
 fendants, com-

mission agents in China, certain goods to be disposed of under the terms of a letter containing the following passage:—"If tea is not obtainable at our limits, you may invest one half of the whole proceeds in silk, at prices &c. . . . If silk is obtainable much below these prices, you may substitute it in part for tea, even if the latter is to be had within our limits, at your discretion:"—*Held*, that, upon the true construction of the above passage, as read with the whole of the letter, the words, "you may invest," were directory, and did not leave the matter to the discretion of the agents.

The declaration stated, that, in consideration that plaintiffs at London would consign to defendants at China certain goods for sale and receipt of the proceeds there by defendants, on account of the plaintiffs, for reward in that behalf, defendants promised to invest and remit the said proceeds to plaintiffs at London, within a reasonable time after receiving the said proceeds, by purchasing, to the amount of £500, any other article than tea and silk, if defendants thought fit; and that, if tea could not be bought by defendants, and silk could, within certain prices agreed upon, and if defendants did not purchase any other article than tea and silk, then that defendants would purchase silk to the extent of half the said proceeds; that defendants afterwards received the goods and sold them, and received the proceeds thereof; and, while they held them for more than a reasonable time, that defendants did not invest any part of the proceeds in any other article than tea or silk; and that while they could have bought silk, and could not have bought tea, within the prices agreed upon, defendants did not invest the said half part of the said proceeds in silk, within the prices agreed upon, for more than a reasonable time after the receipt of the said proceeds, &c. Plea, that, after defendants received the proceeds of the goods consigned, they could not have bought silk at the prices specified, *modo et forma*; concluding to the country; upon which plea issue was joined:—*Held*, that, upon the true construction of the term "*proceeds*," in the issue raised by this plea, the question was, not whether defendants could have bought silk at China, at the prices agreed upon, after the whole proceeds had been received by them, but whether they could have bought silk at China at those prices after they had received a part or parts of the proceeds, for the remittance of which more than a reasonable time had elapsed from the period when they first began to receive such part of the proceeds as was considerable enough to be remitted.

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consideration that the plaintiffs at London would consign to the defendants at China divers goods, wares, and merchandise of great value, to wit, &c., for sale and receipt of the proceeds there by the defendants, for and on account of the plaintiffs, for certain reward to them, the defendants, in that behalf, the defendants promised the plaintiffs that the defendants would invest and remit the said proceeds to the plaintiffs at London within a reasonable time next after so receiving the said proceeds, by the purchase, to the amount of £500, of any other article than tea and silk, if the defendants thought fit; and that if, within such reasonable time as aforesaid, tea could not be bought by the defendants, and silk could be bought by the defendants, at China aforesaid, within certain prices for each respectively agreed on between the plaintiffs and defendants, and if the defendants did not purchase any other article than tea and silk, then that the defendants would purchase silk, to the extent of half the said proceeds, and consign the same to the plaintiffs at London. And the plaintiffs, confiding in the promise of the defendants, did then, to wit, &c., consign to the defendants, at China aforesaid, the said goods, wares, and merchandise, for sale there as aforesaid, the proceeds of which were to be received by the defendants for and on account of the plaintiffs, and invested and remitted to the plaintiffs at London, by the purchase of goods, according to the said promise of the defendants; that afterwards, to wit, on &c., the defendants received the said goods, wares, and merchandise, consigned to them as aforesaid, and then sold the same and received the proceeds thereof, for and on account of the plaintiffs as aforesaid, to wit, amounting to &c.; and after the defendants so received the said part of the proceeds, and while they held the said proceeds in their hands for more than a reasonable time, to wit, for the space of three months, the defendants did not invest any part of the said proceeds in any other article than tea or silk; and, during all the time last aforesaid, the defendants could have bought

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silk, and could not have bought tea, at China aforesaid, within the prices for each respectively agreed on between the plaintiffs and defendants, as the defendants then well knew; yet the defendants neglected, omitted, delayed, and refused to invest the said half part of the said proceeds for the plaintiffs, according to their said promise, by the purchase of silk at China aforesaid, at and within the said prices so agreed on in respect thereof, for more than a reasonable time after they had received the said proceeds for investment as aforesaid, to wit, for the space of three months, until the time when such purchase could be made had elapsed and expired, and the market and opportunity for the said investment was lost to the plaintiffs by the neglect and default of the defendants; and by reason of the premises aforesaid, the plaintiffs have sustained great loss and damages, and have lost and been deprived of the profits which might and otherwise would have arisen and accrued to them from the investment of such part of the said proceeds in the said silk, and remittance and consignment thereof to the plaintiffs as aforesaid. The second count was for money had and received.

The defendants pleaded, first, to the whole declaration, non assumpserunt; secondly, to the first count, that, after they received the proceeds of the goods consigned to them, as in the first count mentioned, they could not have bought silk at China within the prices agreed upon between the plaintiffs and defendants, modo et formâ, concluding to the country; and thirdly, to the first count, that the contract was rescinded. There were also other pleas, which became immaterial. The plaintiffs joined issue upon the first two pleas, and traversed the third; and upon that replication issue was joined.

At the trial of the cause, before the Lord Chief Baron, at the London Sittings after Hilary Term last, it appeared that the plaintiffs were general merchants, who carried on an extensive business as such in England, and that the defendants were agents in China for the sale of goods.

consigned to them; and that, in the year 1842, the plaintiffs consigned to the defendants, for sale in China, various cotton goods, by a vessel called the Patna, and that the instructions as to the disposal of the goods, and the mode in which the return of the proceeds arising from such sale was to be made, were contained in the following letter. This letter had been preceded by several others, upon matters of business concerning the investment of goods.

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“Messrs. Dent & Co., China.

“London, December, 26th, 1842.

“GENTLEMEN,—The Patna now being nearly ready for sea, and the goods of our Manchester house being all on board, (of which they have sent you the invoices), it only remains for us to send instructions regarding the disposal of them and investment of the proceeds, as we intimated our intention of doing when we addressed, as per inclosed duplicate, overland, on the 6th of December. You will observe, by the bills of lading, that the vessel is subject to your orders as to proceeding from Macao to any of the new ports or Canton, and that extra freight is payable per day, as well as a charge per ton, in the event of discharging at a port where port dues are levied. As you have this authority, either to send the Patna forward or to transship our goods, we leave it to you to judge for us, from the terms agreed upon, which course it is best to adopt in the event of your deciding on sending them forward; and, as to the latter, we have only to repeat the same views that we expressed, in advising you on the 6th of April, of our having ordered goods to be sent to your firm from Bombay, viz. that we should be the more desirous to make trial of the new ports, in the event of your establishing a branch of your own house in any of them, or sending any supercargo of your own thither. The only restriction we would put on it, however, is, that the shipment should be made to respectable British agents, and not run any risk by being

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sent with contraband goods, as opium, &c. We wish the sales, whenever made, to be guaranteed, if made on credit; but should prefer sales for cash. Our insurance covers shipment by any ship or ships from Macao to any port or ports in China, but with returns, according to the port of discharge, as well as half per cent. if not transhipped; and we are not insured against sea damage. It only occurs to us to suggest, that, as the twist of our Manchester house is so favourably known at Canton and Macao, it may be desirable to realise it in that district, as it would have to earn its reputation in any new port, a consideration which does not apply to the piece goods. We do not, however, restrict you in this respect. The piece goods, you will notice, consist, as on the former occasion, of a variety of qualities; and we earnestly request you will inform us which of them are the most suitable for the market where they may be sent, to guide us in any future shipment.

"In investing the proceeds, the orders for tea, which we have sent you on the 4th of November and 6th of December, will probably be available, and we confirm them for this object; but if the former has been already executed, we should not wish any more tea to be bought at those limits, but you may invest the whole of the proceeds at the limits of our last order, as inclosed herein. In regard to selection, we think the common qualities, if equally cheap, should be preferred, particularly if purchased in new districts, as the out-turn of tea from thence is uncertain, and we would rather insure lowness of cost, as we stated on the 6th of April, provided the tea be a sound and merchantable article.

"If tea is not obtainable at our limits, you may invest one-half of the whole proceeds in silk, at prices not exceeding, with freight, as well as all charges and commissions on your side, and reckoned at the current rate of exchange of the day, 15s. 6d. to 17s. for fair to good Teatlee, and in proportion for other qualities, either in the Canton River or the

new districts. If silk is obtainable much below these prices, you may substitute it in part for tea, even if the latter is to be had within our limits, at your discretion. You are at liberty, as on the former occasion, to invest any amount, not exceeding £500, in any other article than the above, which may be known to be saleable in this country, provided the price be low and your opinion of it favourable.

"If bullion or specie should be taken in payment, you will please to act, as to remitting it or converting it into bills on London, in the mode suggested in our order of the 6th of April, to which please refer. In the event of your having bills to remit, please to guarantee them by your own indorsement, and send them to us overland by way of India. You will, of course, adopt this mode of remittance, if none of the others indicated should be practicable under our instructions, and take only good bills on this place.

"We are, &c.,

"ENTWISLE & GARNETT.

"P.S.—Your shipments will, of course, be by good A. 1 British vessels to London, per steamer."

The plaintiffs, amongst several other letters which were given in evidence, received the following from the defendants:—

"Macao, 13th February, 1844.

"GENTLEMEN,—We received, on the 1st inst., your favour of the 31st of October. We much regret, on your account, that, at the only time raw silk was obtainable within the limits formerly given us, your instructions, on which we were then acting, viz. of the 6th of June, cancelled all orders for produce, excepting one for tea, the value of which, we fear, will be much affected in England by accounts now going home of the early and heavy exports. Our market for imports of late has been without much change; but we have to notice a slight improvement in the value of long cloths, of which

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the stock landed in Canton is light; of white, indeed, scarcely any remain in first hands. The demand has been good, both for white and gray. The former may be quoted at H 3 80 at 4, and gray H a 3 at 15, short price, viz. the purchaser paying the duty. Prices of cotton cloths at Shanghai are considerably lower than our quotations: say, white 3, 75 per piece, and gray H 33, 82, from which duty and all extra expenses of freight, insurances, &c., must be deducted. * * * The price of raw silk has been obtained throughout the season, ruling for Tsatlee H 500 at 530, duty paid; of Taysaam we believe none has been exported. The Canton market is now bare of silk, but further arrivals may be expected. We estimate the export to date to exceed 2000 bales. A late purchase of silk is quoted at Shanghai, where the stock was large; but much having been diverted to Canton, we believe it cannot now be estimated at more than 500 bales. The price of tea continues without much alteration. A reported short supply of green teas, of which as yet no confirmation has reached us, has induced purchases to be continued at previous current prices, and we hear of a purchase of twelve chests of Twankay, of fair to ordinary quality, at &c. * * * We think it probable, that when the ships now loading for England are dispatched, there will be a cessation of export for some time, our last advices from England being most discouraging for shippers, &c.

(Signed) "DENT & Co."

It further appeared, that although silk was obtainable within the plaintiffs' limits, the defendants invested the whole of the proceeds realised in tea; and that, previous to investing any part of the plaintiffs' fund then in their hands, which at that time amounted to £5000, and during the period when silk was obtainable within the plaintiffs' limits, they purchased all the silk in the market on their own account, and shipped it to England by the Patna.

It was contended, on the part of the defendants, that the manner in which the proceeds were to be invested was wholly left to their discretion, and consequently that they were not bound to invest any part of the proceeds in silk; and moreover that, under the contract set forth in the declaration, the defendants were under no obligation, upon the realisation of *any* portion of the proceeds, to invest half of it in silk, if it should happen that tea was too high in price.

The Lord Chief Baron was in favour of the latter proposition, but left the question to the jury. With regard to the first proposition, he thought that, although the defendants might not be bound to invest half of the proceeds, when only a very small portion had come into their hands, yet they were bound to do so when any large amount had been received by them, with the exception of £500, as to which they had a discretionary power; for, if it were otherwise, the defendants would have an excuse for not performing the order, if but a small portion of the cargo remained unrealised. The jury found a verdict for the plaintiffs for the full amount of the damages claimed.

Sir Fitzroy Kelly, in Easter Term last, obtained a rule nisi for a new trial, on the ground that the Lord Chief Baron had misdirected the jury in three respects, and that the damages were excessive.—Against which

Martin and Smythies, in Michaelmas Term last, (Nov. 11, 18), shewed cause.—The present rule was obtained upon four grounds. The first is, that the term "*proceeds*," which is a material allegation in the declaration, means *all the proceeds* arising from the disposal of the cargo; and that this being the true construction of the contract, the defendants were entitled to have the issue found for them which they raised by their pleadings, viz. that *after they received the proceeds* of the goods, they could not have purchased silk

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within the plaintiffs' limits; or, in other words, that as the entire fund had not been received, they were not bound to invest. The second objection is, that such being the true construction of the term "*proceeds*," the jury should have been precisely informed of its meaning. And the third objection is, that the words, "*you may invest*," in the letter of the 26th of December, 1842, leaves it as a matter of discretion with the defendants; in a word, that it means "*you may*," and not "*you must*." The last objection is to the damages.

Now it would be perfectly unreasonable to construe the contract set forth in the pleadings, as giving the defendants liberty to invest no portion of the proceeds in their hands until they should have received every portion. But if it were to be held that such is the true meaning of the contract stated in the declaration, the plaintiffs might have amended at the trial, as, in point of fact, this objection amounts to a question of variance. The objection should, therefore, have been made at the trial. The defendants did not pretend that it was not their duty to make the investment. The case, in fact, was left to the jury in a manner too much in the defendants' favour. The letter of the 26th of December contains a clear, positive, and imperative order as to the investment of the proceeds in silk, and as to that matter there was no discretion. There is no objection raised to the direction upon the second count, and the plaintiffs are clearly entitled to retain their verdict upon that count: *Moseley v. Reade*(a), *Parry v. Roberts*(b). [*Parke, B.*—In an anonymous case in 11 Modern Reports(c), it was said by *Powell, J.*, "If I give money to another to buy goods for me, and he neglects to buy them, for this breach of trust I shall have election to bring *debt* or *account*. *Holt, C. J.*, *contrà*.—If the party did not take it as a debt, but *ad computandum*, or *ad merchandisandum*, it must be

(a) 10 Jur. 18. (b) 3 Ad. & Ell. 118. (c) Page 92.

on account, and he shall have the benefit of an accountant; which is, he may plead being robbed, which shall be a good plea in the last case, and not in the first." You cannot retain the verdict upon the common count.]

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Sir *F. Kelly*, *Channell*, Serjt., Sir *J. Bayley*, and *Bovill*, contra.—As to the last point, they contended that the true meaning of the terms of the letter was, that the defendants might invest half the proceeds in silk if they pleased, but that they were not bound to do so; that this question turned upon the passage in the letter of the 26th of December, and such was the fair and reasonable construction of the order: and as to the first and second objections which had been raised by the defendants to the direction of the learned judge, that, assuming the declaration to set out the true contract between the parties, the jury should have been specifically directed that it was a contract under which the defendants were not bound to invest any part of the proceeds until they should have received all and every part of them, and that the objection did not amount to a question of variance; that time was an essential part of the contract, which was indivisible; that the defendants had not received the whole of the proceeds, and, consequently, were not liable under this form of declaration; and that the learned judge had not, with a sufficient degree of explicitness, pointed out to the jury what was the precise duty of the defendants.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—(After stating the pleadings, his Lordship proceeded:) On the argument of this case, Sir *Fitzroy Kelly* insisted that I had misdirected the jury in three respects, and that the damages were excessive.

The main objection was, that the issue on the second plea ought to have been directed to be found in favour of the defendants.

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This depends upon the question in what sense the term "*proceeds*" is to be understood in that issue. If it mean the *whole* proceeds of the goods consigned, after the whole should be sold, and the allegation in the declaration is, that after the *whole* proceeds were received, the defendants could have bought silk at China at the prices agreed upon, that issue ought to have been found for the defendants, for the fact was not so; but if it mean that, after they received some of the proceeds, they could have bought silk at the prices specified, the issue ought to be found for the plaintiffs.

In deciding this question, we are to assume that the contract is correctly set out in the declaration. It seems to us that the true meaning of the contract, as there set out, is not that every part of the proceeds is to be received before a remittance is to take place; for then, if the consignment was large and took a great time to sell, the period of remittance might be indefinitely postponed, and, indeed, never take place at all. Were the defendants to hold the proceeds till the very last article was sold? We think not; but the receiving being a continuing act, taking place from time to time, they were to remit the proceeds in a reasonable time after they *began* the receiving, not after they ended it; and that reasonable time would commence so soon as a part, considerable enough to be remitted, was received, and would not expire until the defendants could ascertain in what mode they were to remit that portion of the proceeds—the whole being to be remitted in tea, or, if the price of that article was beyond certain limits, then one-half in silk.

Putting that reasonable interpretation on the contract, the allegation that the defendants received the proceeds does not mean that they received the whole proceeds of the whole of the consignment, but that they received a part or parts, for the remittance of which more than a reasonable time had elapsed; and the second plea means only, that after they had so received such part or parts of the proceeds, the defendants

could not have bought any silk as alleged. In this view of the meaning of these pleadings, there was evidence in support of the plaintiffs' case well worthy of the consideration of the jury; for the defendants, by a letter of the 13th of February, 1844, admit that raw silk was obtainable at one time at the limits, and they give an excuse, which is palpably wrong, for not executing the order at that time, and the jury might well consider them as having given judgment against themselves. We therefore think that this objection ought not to prevail.

The second ground of supposed misdirection was, that the jury were not sufficiently informed, supposing this to be the true construction of the contract; but, from the statement of the learned counsel and of my note, it is clear that the question was properly left to the jury, and quite sufficiently explained.

The third ground of objection was, that, according to the true construction of the letter of order, (December 26, 1842), there was no positive direction to invest one-half in silk if tea could not be purchased at the prescribed limits: the words of the letter being, "you *may* invest," but only a permission to do so, leaving the matter in the discretion of the defendants. But we think that, looking at the whole of the letter, these words are to be construed to be directory, because, in the same sentence in which discretion is intended to be left, it is so expressly stated. In truth, it is only a courteous mode of ordering the silk to be purchased.

Lastly, it was said the damages were too large, and so I thought at the trial; but no new trial will be granted on this account, if the plaintiffs will reduce the damages to what they ought to have been, viz. as the Court intimated, by one-half.

Rule accordingly.

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BADHAM v. BADHAM.

In a cause which had been referred to arbitration by an order of Nisi Prius, the arbitrator made an award in favour of the defendant, who thereupon signed judgment. The plaintiff obtained a rule to set aside the award, notice of which was served upon the defendant. The defendant afterwards, and before the argument of the plaintiff's rule, obtained a judge's order to stay all further proceedings until the plaintiff should have given security for costs:—*Held*, that the Court could not entertain the application for setting aside the award whilst this order remained in force.

IN this case an action of covenant had been brought upon an indenture, to which the plaintiff and defendant and certain other persons were respectively parties. The defendant had pleaded (*inter alia*) *non est factum*; upon which plea issue was joined, and the cause went down to Warwick for trial at the Lent Assizes, 1847, when it was referred, by an order of Nisi Prius, to the decision of an arbitrator. The arbitrator made his award in the month of June following, in favour of the defendant, who signed judgment on the 19th of the same month.

On the 9th of November, in Michaelmas Term last, *Gray* obtained a rule, calling on the several defendants to shew cause why the award should not be set aside, on the ground that it was bad in several respects. After this rule had been served on the defendant's attorney, an order was made, at the instance and on the application of the defendant, by *Platt*, B., that all further proceedings in the cause should be stayed until the plaintiff should have given such security for the defendant's costs as the Master should approve. The above rule, having come on for argument at the termination of the last day of Michaelmas Term, was enlarged to the first day of the present term: the plaintiff's counsel to be at liberty to make any preliminary objections to the rule.

Whitehurst now shewed cause.—The plaintiff is not entitled to be heard, whilst the order of *Platt*, B., is in force and not complied with. In *Murray v. Silver* (a), *Tindal*, C. J., says, "It is difficult to say that taking out a rule to discontinue is not taking a step in the cause. In order to perfect it, the plaintiff must go on and procure the costs to

be taken; which clearly would be taking a proceeding in the cause." In *Ball v. Stanley* (a), *Parke*, B., says, "I was strongly inclined to think that the term 'further proceedings,' in the previous order, meant only the ordinary proceedings, with a view to final judgment; and under that impression I granted the order for holding the defendant to bail. The point was ably argued by Mr. *Williams*, on moving for the present rule, and I am now satisfied that my first impression was wrong, and that this is clearly a collateral proceeding in the cause, although not a necessary proceeding towards final judgment." That was the case of an order to arrest the defendant, which the plaintiff had obtained, which was altogether a collateral proceeding. In *Wyatt v. Prebble* (b), *Littledale*, J., says, "I think you cannot be allowed to enlarge your rule, as that enlargement would be a 'proceeding,' and therefore in violation of the rule which has been drawn up, with a stay of proceedings." The plaintiff has therefore no locus standi here.

Gray, in support of the rule.—This rule ought to be made absolute. It is not just that the plaintiff should be deprived of his legal right to set aside the award, merely on the ground that he has not given security for costs which it may not be in his power to obtain. The ordinary operation of an order staying proceedings till security for costs is given, does not deprive the plaintiff of any legal right, but merely operates so far as to delay him in his proceedings; whereas, if the effect which the defendant endeavours to give to the order were held to be correct, the plaintiff would be too late to move to set aside the award, and so would not only be delayed, but would also be deprived of his right to make that motion. The Court will not assume that the plaintiff can find security for costs. [*Alderson*, B.—How can you be heard whilst the order remains

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(a) 6 M. & W. 396.

(b) 5 Dowl. P. C. 268.

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in force? We can only make the rule absolute upon security being given.]

PER CURIAM (a).—The present rule will neither be made absolute nor discharged, but the plaintiff may have liberty to move as he may be advised, after having given security for costs (b).

(a) *Pollock, C. B., Parke, B., Alderson, B., Platt, B.*

(b) In the course of the same term, the plaintiff obtained an order to set aside his own order for security for costs. *Gray*, thereupon, obtained a rule to revive

the former rule, and to shew cause why the award should not be set aside; which rule was afterwards, in this term, discharged upon the merits, the award being held good.

Jan. 12.

HENRY v. NASH.—(Same v. Twenty-seven Others severally.)

THE *Attorney-General* had obtained a rule, in Trinity Term, 1846, calling on the plaintiff to shew cause why the plaintiff should not elect upon which one of the twenty-eight actions above mentioned he would proceed to trial, and why all further proceedings in the mean time, except in the case which the plaintiff should so elect, should not be stayed until after the trial of such action, by which the defendants would be bound, and why the defendants should not be relieved from all costs incurred subsequently to the 29th of January, 1846, except in such action.

The plaintiff having brought twenty-eight separate actions against as many railway directors, in January, 1846, in the following month delivered twenty-eight separate declarations, to which the defendants pleaded separately in abatement the pendency of another action; in one action a defendant withdrew his plea and pleaded in bar, and upon that plea issue was joined, and the cause was referred to arbitration at the sittings after the following Trinity Term, all the parties agreeing to be bound by the award, and the plaintiff subsequently had an award in his favour. In Trinity Term, the plaintiff had judgment on demurrer to the plea in abatement in one action, whereupon the plaintiff demanded joinders in demurrer in the twenty-six others, but offered to consolidate. The defendants having obtained a rule in Trinity Term, calling on the plaintiff to elect upon which to proceed, and to be relieved from costs incurred since the time of pleading in abatement, and in the mean time to stay proceedings:—The Court held, that the rule ought to be discharged, but suggested that it should be disposed of by consent, as if it had been obtained *after* the award was made, in which case the plaintiff would be entitled to his debt and costs in pursuance of the award, and of costs incurred since the time of pleading in abatement, with costs of all the writs, and that all proceedings would be stayed, except in the cause referred.

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It appeared from the defendants' affidavits, that the plaintiff had brought twenty-eight separate actions against the defendants, who were members of the provisional committee and directors of the Derby, Uttoxeter, and Stafford Railway Company, for surveying and work done for them by the plaintiff. The amount of the sum claimed exceeded £4000. Writs were issued against the several defendants in the early part of January, 1846. On the 19th of that month the plaintiff's attorney received the following letter from the solicitors of the company:—

“Henry v. Nash.—Same v. Ede, &c. &c.

“Gentlemen,—In consequence of your having commenced actions against the above-named defendants, with many others, for a similar amount, which we presume you consider to be due from them as directors and provisional committee-men of the Derby, Uttoxeter, and Stafford Railway Company, we hereby give you notice, that, should there be any liability on their parts, we consider the same is a joint liability, and beg to inform you that we have received instructions to defend all actions commenced against any member of the above company, and that we are prepared to give you any undertaking that you may require to try the merits that Mr. Henry may think proper to bring against any such member. We therefore request that you will do us the honour to inform us, in the course of tomorrow, of the names of the provisional committee-men or provisional directors against whom you have issued writs, informing us of the names of those served and those not served, and we will undertake to appear to all those actions where the parties have not been served, upon your forwarding to us the copies of the several writs against such parties. Should you, however, decline to comply with our request, we beg to inform you that we will appear for as many defendants as you like to include in one writ; but should this offer also be refused, we shall feel obliged by your

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giving us the names of all the parties against whom you have issued or intend to issue writs, in order that we may make such application or applications to the Court, from time to time, as counsel may advise.

“Yours, &c.”

On the 23rd and 25th of February, twenty-eight declarations, in all the actions, were delivered, which were identical in every respect, with the exception of the names of the different defendants. On the 27th, the defendants pleaded separately, in abatement, the pendency of another action against another individual for the same claim. On the 16th of April, in the case of *Henry v. Ede*, the plea in abatement was withdrawn, and the defendant pleaded non assumpsit, upon which plea issue was joined, and the cause, when called on for trial at the sittings after Trinity Term, 1846, was referred to arbitration, the defendants in each action agreeing to be bound by the result of that action. On the 17th of November, 1847, an award was made in favour of the plaintiff for £180. On the 3rd of June, 1846, in the case of *Henry v. Goldney(a)*, the Court of Exchequer gave judgment for the plaintiff, against the plea in abatement; and on the 5th, the plaintiff's attorney demanded joinders in demurrer in twenty-six of the above actions.

It appeared by the plaintiff's affidavits, that the plaintiff's attorney made several offers to consolidate the actions shortly after they were commenced; that on the 6th of June he made a similar offer before a judge at chambers; and again on the day when the decision in favour of the plaintiff was given on the demurrer to the plea in abatement; and that, in consequence of the defendants taking no notice of the plaintiff's offer to consolidate the actions, demands for joinders in demurrer had been made; and that defendants

(a) 15 M. & W. 194.

had joined in demurrer. The above rule had been enlarged from time to time, by consent of the parties.

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Martin and Crompton (*T. Jones* with them) now shewed cause.—The only part of the rule which will be much relied upon by the defendants, will be that by which they seek to be relieved from costs incurred subsequently to the 19th of January. This application is too late; the defendants should have come promptly. The plaintiff could not safely accede to the proposal on the part of the defendants' attorney, as he did not know whether he had any authority from them to appear: *Bayley v. Buckland* (a). The Court will not stay the proceedings, and the case of *Giles v. Tooth* (b) is an express authority upon this point. There, the plaintiffs having brought eleven actions against as many directors of a railway company, for the recovery of the same demand, the Court refused to stay proceedings in all actions but one. *Wilde, C. J.*, there says, "It is perfectly competent to the plaintiffs to proceed against any one of the parties separately, unless the defendant so sued can give them a better writ against the whole of the joint contractors; and if any difficulty presents itself, it is one that is occasioned solely by the fact of the defendants having entered into so inconvenient a partnership." [*Parke, B.*—In the present case, the plaintiff was anxious and offered to consolidate the actions.] In *Newton v. Belcher* (c), the case of *Giles v. Tooth* was fully recognised, and acted upon by the Court of Queen's Bench. What reason is there why the plaintiff should not have his costs? The defendants have been defeated upon their pleas in abatement.

The Attorney-General and *Bramwell*, contra.—The rule ought to be made absolute. This action is clearly for a joint matter. Here are twenty-eight separate actions brought,

(a) Ante, p. 1. (b) 3 C. B. 665. (c) 16 Law J., N. S., Q. B., 37.

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and a demand made of £4000, and only £180 awarded. *Carne v. Legh* (a) was similar to the present case. There the Court interfered, and stayed the proceedings in the other actions without costs, costs being paid in one only. In *Newton v. Blunt* (b), where two separate actions were brought against two joint contractors, and the debt and costs had been paid in one action, the Court held that an order staying proceedings in the other action, without costs, was right.

PER CURIAM (c).—The present rule must be discharged. But since the defendants would be entitled to relief, by an application to this Court in the nature of an *audita querela*, founded upon the award in the case of *Henry v. Ede*, which has been made since the present rule was obtained, if the plaintiff should proceed in any other action than that, and since, upon such motion, the Court might impose such terms in all the actions but that of *Henry v. Ede* as they should consider equitable, the preferable course will be to dispose of the present rule as upon such motion.—This suggestion being adopted by the parties, the Court said: We think that the plaintiff is entitled to his debt and costs in the case of *Henry v. Ede*, in pursuance of the award in his favour; and that he ought to have the costs of all the writs in the other actions, with costs from the time of pleading in abatement, including those of the present rule, which will be absolute to stay all further proceedings, with the exception of those in *Henry v. Ede*.

Rule accordingly.

(a) 6 B. & C. 124.

(b) 3 C. B. 675.

(c) *Pollock*, C. B., *Parks*, B., *Alderson*, B., *Platt*, B.

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JONES, Assignee of ADAMS, an Insolvent Debtor, v.
SMITH.

Jan. 31.

ASSUMPSIT by the plaintiff, assignee of Samuel Adams, an insolvent debtor, for money lent, and on an account stated. The defendant pleaded, first, non assumpsit, and, secondly, "that the plaintiff was not assignee of the debts, estate, and effects of the said Samuel Adams," modo et formâ, concluding to the country, and upon these pleas issue was joined. At the trial of the cause, before the Under-sheriff of Berkshire, it appeared that the plaintiff was not sole assignee of Adams, but that another assignee had been appointed, who had refused to act. It was therefore contended (amongst other objections raised) that the non-joinder of the other assignee was a fatal objection under the second issue, and that the plaintiff ought to be nonsuited. The under-sheriff, however, was of a contrary opinion, and the plaintiff had a verdict, leave being reserved to the defendant to move to enter a nonsuit.

In actions of contract by the assignees of a bankrupt or insolvent, the proper mode of taking advantage of the non-joinder of another assignee is by a traverse that the plaintiffs are assignees modo et formâ, and not by plea in abatement.

Miller having accordingly obtained a rule to shew cause why a nonsuit should not be entered,

Martin shewed cause (Jan. 28.)—The verdict was rightly entered in favour of the plaintiff, inasmuch as the objection to the non-joinder of the assignee cannot be taken advantage of under this issue. The proper way of raising the defence, if the other assignee ought to have been joined, was by plea in abatement. By the 7 & 8 Vict. c. 96, sect. 10, the insolvent's property is vested in the assignees, and it is submitted that, although this statute vests the property, it does not affect the right of the assignees to sue separately. The case of *Snelgrove v. Hunt* (a), in which

(a) 2 Stark. 424.

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Abbott, C. J., was of opinion that the non-joinder of an assignee of a bankrupt was ground of nonsuit under the plea of the general issue, will be relied on. That case was afterwards moved in banc (a), and although the Court refused any rule, yet the judgment of *Bayley*, J., went upon the ground that the declaration was founded entirely upon promises to the assignees. Another case, *Alvon v. Furnival* (b), was also referred to on moving for this rule, but it is difficult to see what bearing that case has upon the present. The only question under this issue is, whether the plaintiff was assignee of the insolvent, and it was proved that he was. The plaintiff is therefore entitled to retain the verdict. [*Parke*, B.—Supposing that the other assignee should have been joined, what would be the form of plea?] The proper plea is in abatement; this plea does not state that Jones was not sole assignee. In 1 Wms. Saund. 291 *k*, it is said that “in actions by executors, they ought all to join. But if one bring an action, either of debt upon bond or assumpsit, as well as tort, it seems settled that the defendant can only take advantage of it by pleading in abatement, after oyer of the probate, that the other executor mentioned therein is alive, not named. If the defendant plead the general issue, he is too late; he cannot come at the fact of there being another executor.” (He also referred to Com. Dig., tit. “Abatement,” E. (13)).

Miller, in support of the rule.—The case of the assignees of an insolvent debtor differs from that of executors. By the 10th section of the 7 & 8 Vict. c. 96, which amends the stat. 5 & 6 Vict. c. 116, the property of the insolvent is completely and jointly vested in the assignees. The assignees are the representatives of the insolvent, not singly, but as a body. The right of action is vested in all of them, and they ought all to be made plaintiffs in a suit. It is

(a) 1 Chit. Rep. 71.

(b) 1 C., M., & R. 290.

admitted that where the promise was made *to the assignees*, they ought all to join, and that if they did not, it would be ground of nonsuit under this plea. But the statement of the promise is a formal matter, and it makes no difference whether it be made to them or not. Suppose there are three assignees, and two only sue, those who sue are not *the assignees*. The rule with respect to executors does not hold good in the case of assignees; executors may renounce, and that does not appear upon the record, unless the fact be stated. In *Can v. Read* (a), it was held by Lord *Hardwicke*, that payment, by a debtor to a bankrupt estate, of the debt to one assignee, is not a discharge: he should have taken a receipt likewise from the co-assignee. [*Parke, B.*, referred to *Jones v. Yates* (b), *Wallace v. Kelsall* (c), *Gordon v. Ellis* (d), *Taylor v. Buchanan* (e).] *Bloxam v. Hubbard* (f) was an action of tort.—He also referred to *Holland v. Phillips* (g). [*Parke, B.*—In *Scott v. Godwin* (h), it was held that one assignee of a reversion could not sue alone. *Alderson, B.*—What does the second issue mean? Is the question raised by it whether the plaintiff is *sole assignee*?]

Cur. adv. vult.

POLLOCK, C. B., now said:—In this case, which was lately argued, when cause was shewn against a rule obtained to enter a nonsuit upon a point reserved by the sheriff of Berkshire, we are of opinion that the rule ought to be made absolute. The question was, whether the assignee of an insolvent debtor had a right to sue alone upon a promise made to the insolvent, there being another assignee not joined in the action: the defendant's plea being, that the plaintiff was not assignee of the debts, estates, and effects

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(a) 3 Atkyns, 695.

(b) 9 B. & C. 532.

(c) 7 M. & W. 264.

(d) 7 Man. & G. 620.

(e) 4 B. & C. 419.

(f) 5 East, 407.

(g) 1 Bos. & P. 67.

(h) 10 Ad. & Ell. 149.

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of the insolvent, modo et formâ. It was contended, on the part of the plaintiff, in shewing cause against the rule, that the assignees of an insolvent or bankrupt were tenants in common, and that any one of them might sue alone, as in the case of executors; it being admitted that, where there are two executors, one may sue alone, unless the non-joinder of his co-executor be taken advantage of by a plea in abatement. But we are of opinion, that the rule which exists in the case of executors does not apply to that of the assignees of a bankrupt or insolvent. Executors are seised, as the books state, *per my et per tout*, and each executor represents the testator, and may himself dispose of the property. Such is not the case with the assignees of a bankrupt or insolvent; and, without going so far as the case of *Can v. Read*, where, in substance, Lord *Hardwicke* seemed to think that the consent of both the assignees of a bankrupt was necessary to give a valid discharge, it appears to us that the principle upon which the present case ought to be decided is to be found in the case of *Scott v. Godwin*. That was an action by one assignee of a reversion. It appeared on the record that there were two assignees of the reversion, but there was no averment that the assignee who had not been joined as a plaintiff was dead. There is a very long and learned judgment, given by Chief Justice *Eyre* in that case, which, in principle, is decisive of the present. He there marks the distinction between parties in actions of contract and actions of tort. A contract with traders, if they become bankrupt, becomes a contract with the assignees, according to the statute, precisely as if the assignees had themselves been parties to the contract. Now it is clear, and the regular practice, that if there be several parties to a contract, although the non-joinder of a co-defendant can only be taken advantage of by a plea in abatement, the rule is otherwise with respect to the non-joinder of plaintiffs. In the case already alluded to, of *Scott v. Godwin*, *Eyre*, C. J., says, "The question on this demurrer (which

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is now to be considered in the nature of a general demurrer, the special causes having been abandoned) is, whether the plaintiff has shewn in his declaration a title to sue as assignee of the reversion. That title is to be collected from the operation of law on the deeds which are therein stated. I take it to be most clear, that the operation of law upon those deeds is to constitute John and Robert Scott joint assignees. The effect of this is, that the defendant's covenants became also, by operation of law, contracts with John and Robert Scott jointly; and that all causes of action to them, arising out of these contracts, must follow the nature of the contracts, and must arise to John and Robert Scott jointly. In fact, John Scott has declared on a covenant made with John and Robert Scott, but has supposed himself capable of sustaining an action alone for the breach of it. Now that this is fundamentally wrong there can be no doubt; and the principle upon which it is wrong was not denied in the argument. It is only the application of the principle to this particular case, as it stands on the record, that is disputed." The learned Chief Justice, after discussing the several cases upon the subject, and particularly that of *Rice v. Shute* (a), proceeds:—"In truth, till that case, it seems to have been the usual course to nonsuit the plaintiff, if, on the trial of an action of assumpsit, it appeared the defendant had a partner who was not sued; as it remains now the course to nonsuit the plaintiff if he has a partner not made a co-plaintiff. I am not called upon to inquire whether the rule in tort, to which it is said, in *Nelthorp v. Dorington* (b), that Sir William Jones, a sound and able lawyer, accorded *hesitanter*, be well established or not. If a tort, in respect of joint property, can be joint or several, it is very well; a breach of a joint contract with two or more cannot be joint and several. This plaintiff could not sue alone; therefore we are of opinion that there must be judgment for

(a) 5 Burr. 2613.

(b) 2 Lev. 113.

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the defendant." The question, how advantage could be taken of the non-joinder of an assignee of a bankrupt in an action of trover brought by the assignees for a ship belonging to the bankrupt's estate, was considered in the case of *Bloxam v. Hubbard*, and it was held that the assignees might so sue, subject only to a plea in abatement, and recover their portional part of the damage; and there Lord *Ellenborough* says, "It is now too well settled to be any longer disputed in a court of law, that the defendant can only avail himself of an objection of this sort, viz. that all the several part owners of a chattel have not joined in an action of trespass, or of *tort*, brought in respect to it, by plea in abatement." In the case of *Snelgrove v. Hunt*, which was cited in the argument, Lord *Tenterden* most certainly laid it down, that if there are two assignees of a bankrupt, both must join, and that one alone could not maintain an action upon a contract to both; and such, I believe, has ever since been the opinion of the profession. The assignees in the present case, to whom, by the Insolvent Act, is transferred the contract with the insolvent, are really in precisely the same situation, in that respect, as are the assignees of a reversion under the statute of Hen. 8, which gives them the title to sue. Under these circumstances, we are all of opinion that the rule must be made absolute.

PARKE, B.—The plaintiff is not assignee unless he is *sole* assignee.

Rule absolute.

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ACLAND, Bart., v. BULLER and Another.

Jan. 31.

CASE.—Venue, Devonshire. The declaration commenced by reciting, that the defendants, before and at the time of and since the grievances thereafter mentioned, had been Tithe Commissioners for England and Wales, and that one T. P. Acland, since deceased, was owner, according to the intent and meaning of the statutes for the commutation of tithes in England and Wales, of certain lands, situate in the parish of C., in the county of Devon, subject to tithes at the time of the making of the award therein-after next mentioned: and that afterwards, and during the lifetime of the said T. P. Acland, a certain award was made by the Tithe Commissioners in that behalf, to wit, of the total sums to be paid by way of rent-charge instead of the tithes of the said parish, and that the said award was then duly confirmed by the Tithe Commissioners in that behalf, to wit, the defendants; and that an apportionment of the said rent-charge among the lands of the said parish was duly made in pursuance of the statutes in that behalf; and

Case.—The declaration recited that one T. A., deceased, was owner of certain lands, subject to tithes; that, during his lifetime, an award was made, and confirmed by the tithe commissioners, of the sums to be paid in lieu of tithes; that an apportionment of the rent-charge was made, and all expenses incident thereto was paid without dispute or difference; but that defendants, under colour of their office of Tithe Commissioners,

and falsely pretending to act under the authority of the Tithe Commutation Act, wrongfully, wilfully, maliciously, and oppressively intending, by false pretexts, and by a wilful and unjust perversion of the powers of the act, to compel the plaintiff to pay to one F. a sum of money claimed in respect of a certain award, not being expenses incident to the apportionment of the rent-charge in lieu of tithes, and wilfully and maliciously, &c. intending to make the plaintiff pay a certain sum as incident to the expenses of the apportionment, falsely, and without probable cause, made a certificate, by which it was certified, that a certain sum was due from the lands of T. A., deceased, of which plaintiff was then owner, for expenses incident to the apportionment, touching which a difference had arisen between the plaintiff and F.; the declaration then averred that no difference existed, and that the sum of money was not due; and that all expenses had been paid, all of which the defendants well knew at the time they made the certificate; that afterwards, the defendants delivered the certificate in order to be produced before two justices, in order to cause the amount mentioned in it to be levied on plaintiff's goods; that the justices granted a warrant on the production of the certificate, and a distress was levied upon plaintiff's goods.

The defendants pleaded, that the alleged grievances were committed after the passing of stat. 6 & 7 Will. 4, c. 71, and 5 & 6 Vict. c. 97, and that the alleged grievances were committed under the authority of the first act, and that no written notice of action had been given one month before action.—Verification. Second plea: that the alleged grievances were committed after passing of an act in the last plea first-mentioned, and were done under the authority of that act, and they were committed in the county of M—, and not of D.—Verification.

Held, on special demurrer to the pleas, that they were good; and that the action would lie, and was proper in form.

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that afterwards, and before the grievances &c., all the expenses of and incident to the said apportionment were duly paid without dispute or difference: yet the defendants, under colour of their said office, and falsely pretending to act under the authority of the statute made and passed for the commutation of tithes in England and Wales, wrongfully, wilfully, maliciously, and oppressively intending, by false pretexts, and by a wilful and unjust perversion of the powers of the said act, to compel the plaintiff, as the alleged then owner, according to the intent and meaning of the said statute for the commutation of tithes of the said lands formerly of the said T. P. Acland, to pay to the Right Honourable the Earl of F. a sum of money theretofore claimed by the said Earl from the plaintiff, as and for and in respect of the expenses of a certain reference and award, not being expenses of or incident to the said apportionment of the rent-charge in lieu of the tithes of the said parish, and wilfully, maliciously, unjustly, and oppressively intending to harass, oppress, and injure the plaintiff, and to force and compel him, without just cause, to pay a sum of 39*l.* 10*s.* as and for and in the name of expenses of and incident to the apportionment of the rent-charge in lieu of tithes of the said parish, did, to wit, on &c., falsely, unlawfully, maliciously, and oppressively, and without reasonable or probable cause in that behalf, make and sign a certain certificate, bearing date &c., as and for a certificate under the authority of the said act, and did then certify under their hands in manner following:—"We, the undersigned Tithe Commissioners for England and Wales, under and by virtue of the power given to us for that purpose by the act for the commutation of tithes in England and Wales, do hereby certify that the sum of 39*l.* 10*s.* 7*d.* is the share of the expenses of and incident to the apportionment of the rent-charge in lieu of the tithes in the parish of C., in the county of Devon, to be paid by Sir T. P. F. P. Acland, Bart. (meaning the plaintiff in respect of the lands of

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which T. P. Acland, deceased, heretofore mentioned, is stated in and by the apportionment of the rent-charge in lieu of tithes for the said parish to be the owner, and of which lands the said Sir T. P. F. P. Acland is now the owner), and touching which expenses a difference has arisen between the said Sir T. P. F. P. Acland and the Right Honourable Earl F., of &c., the owner of other lands mentioned in the said apportionment, and we further certify that the said sum of 39*l.* 10*s.* 7*d.* is due and ought to be paid by the said Sir T. P. F. P. Acland to the said Earl F., who is entitled to the same." Whereas in truth and fact no such difference, nor any difference, had at any time arisen touching the expenses of or incident to the said apportionment, as the defendants at the time of granting the said certificate well knew; and whereas in truth and in fact the said sum was not, nor was any part thereof due or owing from the plaintiff to the said Earl on any account whatever, as the defendants also then well knew; and whereas in truth and in fact, as the defendants then also well knew, the whole share of the expenses of and incident to the said apportionment, in respect of the lands on which the said T. P. Acland, deceased, was stated in and by the said apportionment to be the owner, had been long before that time paid and discharged without dispute or difference, to wit, on &c.; and thereupon afterwards, and after the making of the said certificate, to wit, on &c., the defendants, wilfully and oppressively, delivered the said false certificate to one S. P., for and in behalf of the said Earl F., in order that the said certificate should be produced before two justices of the peace, acting in and for the said county of Devon, in pretended pursuance of the said act, that the said justices might by warrant cause the amount mentioned in the said certificate to be levied by distress and sale of the goods of the plaintiff, as the person liable to pay the same.—The declaration then proceeded to state, that the certificate was produced before two justices of the county of Devon, who, "by force and

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in consequence thereof, and not otherwise," issued their warrant, which warrant, after reciting the certificate of the Commissioners, and that the certificate had been produced before the justices, and proved to them by the oath of credible witnesses, and that plaintiff had been summoned, and had appeared before them, and had shewn no sufficient cause why the warrant should not be issued, ordered the plaintiff's goods to be distrained. The declaration then alleged that the plaintiff's goods were distrained, and that he was compelled to pay a sum of money to recover possession of them.

Plea, "that the alleged grievances in the declaration mentioned were committed after the passing of a certain act of Parliament made and passed in a session of Parliament held in the 6th and 7th years of the reign of his late Majesty King William the Fourth, and intituled 'An Act for the Commutation of Tithes in England and Wales,' and after the passing of a certain other act of Parliament made and passed in a session of Parliament held in the 5th and 6th years of the reign of her present Majesty Queen Victoria, intituled 'An Act to amend the Law relating to Double Costs, Notices of Actions, Limitations of Actions, and Pleas of the General Issue, under certain Acts of Parliament;' and the defendants further say, that the said alleged grievances were committed under the authority of the said first-mentioned act of Parliament, within the true intent and meaning of that act, and that no notice in writing of this action was given to the defendants one calendar month before the same was commenced, pursuant to the provisions of the said act in this plea secondly above mentioned." Verification.

Second plea, "that the said alleged grievances in the declaration mentioned were committed after the passing of the act of Parliament in the last plea first mentioned, and were done under the authority of the said act, within the true intent and meaning thereof. And the defendants further say, that the said alleged grievances were

committed in the county of Middlesex, and not in the county of Devon." Verification.

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Special demurrer to these pleas, assigning for causes, that the issues raised by them are immaterial; that the declaration charges a wilful perversion of the statute therein mentioned, and therefore that the defendants were deprived of its protection; that the pleas were each an argumentative traverse of the grievances alleged in the declaration, and did not with sufficient particularity set forth all the circumstances, so as to bring the defendants within the protection of the act. Joinder in demurrer.

The defendants' points for argument were, that the form of action should have been *trespass*, and not case; that the declaration shewed upon the face of it that the defendants knew they had no jurisdiction at the time they granted the certificate in the matter of the expenses, and had no power to grant the certificate.

Greenwood, on the 24th January, in the present term, argued in support of the demurrer.—It will be contended on the part of the defendants, that the form of action is wrong, and that it should have been brought in *trespass*. There is a two-fold answer to that objection. First, the proper form, as disclosed by the declaration, is *case*; and secondly, if that is not so, this objection does not hold good on demurrer, for the proper course would be to set aside the writ or the declaration: *Anderson v. Thomas* (a). The distress was made under the warrant of the justices, and not under the certificate of the commissioners, which is given by the 76th section of the Tithe Commutation Act (b). The defendants have been guilty of such a misfeasance as a party makes who procures another to be maliciously arrested by means of false statements. The case of

(a) 9 Bing. 678. (b) 6 & 7 Will. 4, c. 71.

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Goslin v. Wilcock (a) is strongly in the plaintiff's favour. In the present case the certificate is in the nature of evidence, which is falsely and maliciously given by the commissioners. The form of action is therefore correct. [He was then stopped upon this point.] Then the pleas are clearly bad. Their validity rests upon the same ground, namely, that the defendants acted under the authority of the act. They are bad on one of two grounds; either they admit that the defendants are not within the act, or they amount to an argumentative denial of an allegation of the declaration, that the defendants are guilty of a wilful perversion of the statute. The 73rd section enacts, that the expenses of the witness are to be paid under the direction of the commissioners. The 74th enacts, that the expenses of the award are to be paid by the land-owners and tithe-owners, as the commissioners may direct. By the 75th section, the expenses of apportionment are to be borne rateably by the land-owners. The 76th section (b) empowers the commissioners, in case any difference should arise touching the expenses, to make their certificate as to the sum due by any person. Now this certificate does not shew that the defendants had jurisdiction. By that document, T. P. Acland was liable for the expenses. There was no difference or

(a) 2 Wils. 302.

(b) Sect. 76 enacts, "That, if any difference shall arise touching the said expenses, or the share thereof, to be paid by any person, it shall be lawful for the commissioners, or some assistant commissioner, to certify, under their or his hand, the amount to be paid by such person; and in case any person shall neglect or refuse to pay his share so certified to be payable by him, and upon the production of any such certificate before any two justices for the

county, or other jurisdiction wherein the lands mentioned in the agreement, or award, or apportionment are situate, such justices, on the nonpayment thereof, are hereby required, by warrant, under their hands and seals, to cause the same, and costs of the distress, to be levied by distress and sale of the goods of the person liable to pay the same, and to render the surplus, (if any), after deducting the charges of the distress and sale, to the person distrained upon."

dispute between the plaintiff and Earl F. with respect to the expenses due by the plaintiff. The defendants had no jurisdiction to make the certificate, and this appears upon the face of the declaration. [*Parke, B.*—May not the defendants have thought that they had the authority of the act, and yet at the same time have acted maliciously? Is the statement that they acted maliciously material?] The defendants should have had reasonable grounds for supposing that they were acting under the act, in order to be within the protection it affords: *Cook v. Leonard (a)*. In *Lord Oakley v. The Kensington Canal Company (b)*, where the defendants claimed the protection of the stat. 5 Geo. 4, c. 45, sect. 128, *Parke, J.*, said, “The words, ‘anything done in pursuance of this act, or in execution of the powers,’ &c., apply to all cases where the parties are intending to act upon powers given by the statute, and not merely using it as a cloak for their own private purposes.” That case, which is one, perhaps, which has more bearing than any other in the defendants’ favour, is distinguishable; for there the act for which the action was brought was really done for the purpose contemplated by the statute, although the defendants, in the prosecution of that purpose, had been guilty of a misrepresentation. Here the defendants, at the time they granted the certificate, *knew* they had not the power to grant it, and no reasonable person could believe they had under the circumstances. They are therefore not within the protection of the act, and the pleas are consequently bad, as not being applicable to the cause of complaint.—The cases of *Hughes v. Buckland (c)*, and *Charlesworth v. Rudgard (d)* were also referred to.

Peacock, contra.—No action will lie against the defendants. This is a judicial act on their part, and cannot be inquired into by this Court. They may be liable to an

(a) 6 B. & C. 361.

(b) 5 B. & Adol. 138.

(c) 15 M. & W. 346.

(d) 1 C., M., & R. 408.

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indictment, but they are not to a civil action. The rule which applies to justices is also applicable to Tithe Commissioners: *Wilson v. Weller* (a). It is otherwise where there is no jurisdiction: *Milwood v. Caffin* (b); but this is a judicial act, which is left to the commissioners, and cannot be inquired into by this Court. If this proceeding was not under the act, the certificate should have been first quashed, and the matter have been removed by certiorari. The 95th section only takes away the certiorari when the proceeding is under the authority of the act. The certificate is conclusive evidence of the facts contained in it, as in the case of a conviction where no defect appears upon the face of it: *Brittain v. Kinnaird* (c). The making of an award is a judicial act: *Stalworth v. Inns* (d); and the defendants here have only to shew that they acted judicially, to preclude themselves from being subject to an action. [*Pollock*, C. B.—If there was no difference, there was no jurisdiction; the commissioners cannot make jurisdiction by merely saying that there is a dispute.] In the next place, the form of the action is not correct; it should have been in trespass. Where a justice maliciously grants a warrant against another, without any information, upon a supposed charge of felony, the remedy against the justice is trespass, and not case: *Morgan v. Hughes* (e). The certificate of the commissioners was in the nature of a judgment; the warrant of the justices was the proceeding towards execution. If the defendants did not act judicially, the form of action should have been trespass; and if they did, and the action will lie against them, the pleas are good. He also referred to *Reg. v. Hickling* (f).

Greenwood, in reply.—The defendants did not act judicially; they had only to give a certificate of the facts. The

(a) 1 Bro. & Bing. 57.

(b) 2 W. Blac. 1330.

(c) 1 Bro. & Bing. 432.

(d) 13 M. & W. 466.

(e) 2 T. R. 225.

(f) 7 Q. B. 880.

amount to be paid is prescribed by the act. There must have been the fact of difference or dispute, to give them the power to grant the certificate; and that fact is negatived by the declaration.

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Cur. adv. vult.

PARKE, B., now said, that the opinion of the Court was in favour of the pleas, but that the plaintiff might have liberty to amend upon the usual terms; and recommended the plaintiff to reply to the pleas, that the certificate was not given under the authority of the act.

Leave to amend accordingly.

LAW v. DODD.

Jan. 13.

TRESPASS for assault and false imprisonment.—The defendant pleaded not guilty, together with several pleas of justification, under the Metropolitan Paving Act, 57 Geo. 3, c. xxix (a), alleging in substance, that the plaintiff had

A brassfounder, having extracted a quantity of metal from ashes which fell into the ash-pit during the process of casting, was accustomed to give the refuse, in which some metal still remained, as a perquisite to his apprentices, by whom it was sold to brass-refiners, who extracted from the ashes a further quantity of metal:—*Held*, that the ashes, being available for a commercial purpose, were not “dust, cinders, or ashes,” within the meaning of the Metropolitan Paving Act, 57 Geo. 3, c. xxix.

(a) Sect. 59 empowers the commissioners, trustees, or any other persons having the control of pavements in the public places in any parochial or other district, within the jurisdiction of the act, &c., to contract with persons to be scavengers, rakers, or cleansers of the streets or public places within the district, and “such scavengers, &c., shall take and carry away from the respective houses and premises of the inhabitants or occupiers their soil, ashes, cinders, rubbish, dust, dirt, and filth, all of which the said scavengers shall take and carry

away at their own costs and charges, upon pain of forfeiting a sum of 40s. for every default,” &c.

Sect. 60 enacts, “That, if any person or persons, other than the scavengers, rakers, or cleansers of any parochial or other district, or the other person or persons employed or appointed by or contracting with the said commissioners, or trustees, or other persons as aforesaid, to collect and retain the dust, cinders, or ashes, within their respective parochial or other district, or those employed by or under such person or persons, shall, on any pretence

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received ten bushels of dust from a certain house and premises within the east district of the metropolis, which was subject to the said statute, the plaintiff not being one of the scavengers of the said district, nor authorised to collect or carry away the dust, ashes, or cinders therein.

The plaintiff joined issue on the first plea, and to the others replied *de injuriâ*.

At the trial, before *Pollock*, C. B., at the London sittings after last Michaelmas Term, the following facts appeared:—The defendant, who was a carman, had contracted with the commissioners of sewers for the city of London for the privilege of carting away the dust, cinders, ashes, rubbish, &c. from the houses situate in the east district in the city of London. The plaintiff was a person in the employ of a Mrs. Callow, a brass-refiner. On the 30th of November, 1845, the plaintiff was engaged at the house of one Ellis, a brassfounder, in Houndsditch, in removing some ashes from the premises, when he was taken into custody by a servant of the defendant, on the ground that he was illegally removing the ashes, contrary to the provisions of the Metropolitan Paving Act, 57 Geo. 3, c. xxix. It appeared, that, during the process of casting brass, a considerable portion of the metal used to fall into the ash-pit and become mixed with the ashes. The contents of the ash-pit were from time to time washed by Ellis, the brassfounder, and by this process a large portion of the metal was extracted. Some, however, still remained; and it was his practice to give these ashes as a perquisite to his apprentices, who sold them, at the rate of 2s. 6d. per cart-load, to the brass-refiners, and

whatsoever, go about to collect or gather, or ask for, receive, or carry away, any dust, cinders, or ashes, it shall and may be lawful for any justice of the peace for the city, borough, or county within which such parochial or other district may be situate,

upon complaint to him made, to grant a warrant to bring before him such offender or offenders," &c. (The clause goes on to provide for the forfeiture, on conviction, of £10 for the first offence, £15 for the second, and £20 for every subsequent offence.)

they extracted from them a further quantity of brass. A notice of the present action had been given, signed by the attorney for the plaintiff. On the part of the defendant, it was contended that he was entitled to the verdict, on two grounds: first, that the notice of action was insufficient, inasmuch as it ought to have been signed by the plaintiff himself^(a); secondly, that the contents of the ash-pit were "dust, cinders, or ashes," within the meaning of the statute, and consequently the defendant was justified in taking the plaintiff into custody on the charge of removing them. It was answered by the plaintiff's counsel, that the first objection was not open to the defendant, since there was no plea of not guilty (by statute), nor any special plea of want of notice of action; and, as to the second point, they relied upon the case of *Filbey v. Combe* ^(b). The learned judge reserved the first point; and, with respect to the second, he ruled that, if the refuse, which was the result of a manufacturing process, was still available for some commercial purposes, it was not dust, cinders, ashes, or rubbish, within the meaning of the statute. The jury having found a verdict for the plaintiff, with £5 damages,

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(a) Sect. 136 enacts, "That, no action or suit shall be commenced against any person or persons, for anything done in execution or pursuance of any local act or acts of Parliament, relating, either exclusively or jointly with any other objects or purposes, to the pavement of any parochial or other district within the jurisdiction of this act, until after twenty-one days' notice in writing, signed by the person or persons intending to bring such action or suit, and specifying his or their real residence, and his or their trade and profession, shall

be thereof given to the clerk or clerks to the said commissioners or trustees, or other persons having the control of the pavements in any parochial or other district within the jurisdiction of this act, wherein any fact may be committed, or for which such action or suit may be brought," &c. "And if it shall appear that such action or suit was brought before twenty-one days' notice was given, as before directed," &c., "the jury shall find a verdict for the defendant."

(b) 2 M. & W. 677.

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Godson now moved to enter a verdict for the defendant, pursuant to the leave reserved, or for a new trial on the ground of misdirection.—As soon as the metal was extracted from the contents of the ash-pit, the residue became “rubbish,” or “dust, cinders, or ashes,” within the meaning of the act of Parliament. Ellis himself, having treated it as such, was not at liberty to give it as a perquisite to his apprentices. In *Filbey v. Combe* (a), where a question arose as to the meaning of the 59th section of this act of Parliament, *Parke, B.*, says, “I think it is clear, if you look at the whole context, that it applies to such things as are, in the contemplation of the owner, *rubbish*, and which he desires to dispose of in that character.” The contents of this ash-pit come within that denomination. [*Alderson, B.*—If this is “metallic ash,” that is, ash from which metal may be extracted, it is an article of commerce, and not rubbish.] So long as Ellis continued to wash the contents of the pit, the refuse could not be considered as rubbish; when only a few minute particles of metal remained, and he himself treated the ashes as rubbish, the scavenger became entitled to them. [*Parke, B.*—The jury have found that these ashes are valuable as a process of manufacture: it can therefore make no difference that the owner gave them as a perquisite to his apprentices. It is true that, if the refuse were nothing but ashes, like those from coal burnt for domestic purposes, the owner could not defeat the scavenger’s right by giving them to his servant; but this refuse is treated as a metallic substance, and used as ore in a branch of manufacture. *Alderson, B.*—If your argument be correct, gas companies would have to give to the scavengers all the coke they produce, since they make no use of it themselves.] Secondly, the notice of action was insufficient. The statute requires it to be signed “by the person or persons intending to bring such action or suit;” here the notice

(a) 2 M. & W. 677.

was signed by the attorney. *Richards v. Easto* (a) will perhaps be relied on as an authority to shew that the objection ought to have been specially pleaded. But the words used in the 163rd section of this statute are, "if it *shall appear* that such action or suit was brought before twenty-one days' notice was given, as before directed," &c. Those words require the plaintiff to prove, as part of his case, that a proper notice of action was given. [*Parke, B.*—That is, provided the defendant pleads the general issue by statute.] The 5 & 6 Vict. c. 97, has taken away the power of so pleading. [*Parke, B.*—Having done so, it has also taken away the benefit of raising the objection in evidence under the general issue.] This case resembles the Apothecaries' Act, 55 Geo. 3, c. 194, s. 21. [*Parke, B.*—The words of that act are, that no apothecary shall be allowed to recover any charges "unless he *shall prove* on the trial" that he was in practice prior to 5th August, 1815, or that he has obtained his certificate. That means, without reference to the defendant's plea. *Richards v. Easto* decided, that now the general issue is taken away under statutes of a local and personal nature, the defendant cannot in such cases take advantage of the want of notice, unless he pleads it.]

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PARKE, B.—There ought to be no rule. With respect to the first point, the refuse of the ash-pit was not "ashes, cinders, dust, or rubbish," within the meaning of the act of Parliament, but an article of commerce used in the process of manufacture. As to the other question, *Richards v. Easto* is precisely in point.

ALDERSON, B., and PLATT, B., concurred.

POLLOCK, C. B.—I am of the same opinion. The second point is disposed of by the case referred to. As to the

(a) 15. M. & W. 244.

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other question, it is manifest that the contents of the ash-pit were sold as ashes containing metal, for the purpose of being submitted to a manufacturing process; they cannot, therefore, be considered as mere "ashes, dust, or rubbish."

Rule refused.

Jan. 18.

ROBINSON v. HARMAN.

Where a party agrees to grant a good and valid lease, having full knowledge that he has no title, the plaintiff, in an action for the breach of such agreement, may recover, beyond his expenses, damages resulting from the loss of his bargain; and the defendant cannot, under a plea of payment of money into court, give evidence that the plaintiff was aware of the defect of title.

ASSUMPSIT on an agreement in writing, dated the 15th April, 1846, whereby the defendant agreed "to grant and deliver to the plaintiff a good and valid lease of a certain dwelling-house, &c., and other hereditaments and premises in the agreement mentioned, for a term of twenty-one years from the 29th day of September then next ensuing, at the yearly rent of £110," &c. The declaration set out the agreement in terms, and, after alleging mutual promises, averred that, although the plaintiff had always been ready and willing to accept a lease, yet the defendant did not nor would grant a good and valid lease of the said dwelling-house, &c., and discharged the plaintiff from preparing and tendering such lease, and wholly neglected and refused to grant or deliver the said or any lease whatever of the said hereditaments and premises; "whereby the plaintiff lost and was deprived of great gains and profits, which would otherwise have accrued to him, and paid, expended, and incurred liability to pay divers sums of money, in and about the preparation of the said agreement and lease, &c., amounting, to wit, to £20."

Plea, payment of £25 into court, and no damages ultra.

The plaintiff replied damages ultra, upon which issue was joined.

At the trial, before Lord *Denman*, C. J., at the Surrey Spring Assizes, 1847, it was proved that the plaintiff and

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defendant had entered into the agreement set out in the declaration, by which the defendant agreed to grant to the plaintiff a good and valid lease of a dwelling-house and premises, situate in High-street, Croydon, for a term of twenty-one years from the 29th September, 1846, at a yearly rent of £110. The premises in question had belonged to the defendant's father, who was recently dead, and in consequence, the plaintiff's solicitor, while preparing the agreement, asked the defendant whether he was sure that he had power to grant the lease without the concurrence of other parties, and suggested that the will might have vested the legal estate, or the power of leasing, in trustees. The defendant replied, that there was nothing of the sort, that it was his property out and out, and that he alone had the power of leasing. It appeared, however, that the defendant's father had devised the premises in question (subject to an annuity of £300 to his daughter) to trustees, to pay the defendant a moiety of the rent during his life only. The premises were worth considerably more than £110 a year, and the bill of the plaintiff's solicitor, for preparing the agreement and lease, and investigating the title, amounted to 15*l.* 12*s.* 8*d.* On the part of the defendant, evidence was tendered to shew that the plaintiff, when he entered into the agreement, had full knowledge of the defendant's incapacity to grant the lease; but the learned judge ruled that such evidence was inadmissible. It was urged, on the part of the defendant, that the plaintiff could not recover damages for the loss of his bargain; and that, as the sum paid into court exceeded the expenses which he had been put to, the defendant was entitled to the verdict. The learned judge was of a different opinion, and a verdict was found for the plaintiff for £200, beyond the sum paid into court.

A rule nisi having been obtained to set aside the verdict, and for a new trial,

Shee, Serjt., and *Willes* now shewed cause.—First, the

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evidence tendered was inadmissible. It is well established, that when a defendant pleads only a plea which admits the plaintiff's right to recover, evidence of facts which would bar the action is not admissible in mitigation of damages: *Speck v. Phillips* (a). Secondly, the plaintiff is entitled to recover damages for the loss sustained by the non-performance of the contract. The cases of *Flureau v. Thornhill* (b) and *Walker v. Moore* (c) are relied upon by the other side. The plaintiff in the former case bought, at an auction, for £270, a rent of 26*l.* 1*s.* per annum, for a term of thirty-two years, issuing out of a leasehold house, which let for 31*l.* 6*s.* On looking into the title, the defendant could not make it out; but offered the plaintiff his election, either to take the title with all its faults, or to receive back the deposit with interest and costs, but the plaintiff insisted on a further sum for damages in the loss of so good a bargain. The defendant had paid the deposit and interest, being 54*l.* 15*s.* 6*d.*, into court; but the jury gave a verdict, contrary to the direction of *De Grey*, C. J., for 74*l.* 15*s.* 6*d.*, allowing £20 for damages. Cause having been shewn against a rule for a new trial, *De Grey*, C. J., said, "I think the verdict was wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is, without fraud, incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." *Blackstone*, J., says, "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected. In contracts of that description there is no warranty of title, but merely a condition annexed, that, if the vendor is not able to make a good title, the contract shall be at an end." Such a case essen-

(a) 5 M. & W. 279. (b) 2 W. Bla. 1078. (c) 10 B. & C. 416.

tially differs from the present, where the defendant has positively engaged that he will grant a good and valid lease, not having at the time any colour of title. In *Walker v. Moore (a)*, which was a contract for the purchase of a real estate, the vendor, acting bonâ fide, delivered an abstract shewing a good title; and the vendee, before he examined it with the original deeds, contracted to resell several portions of the property at a considerable profit. Upon a subsequent examination of the abstract with the deeds, the vendee discovered that the title was defective; and thereupon the sub-purchasers refused to complete their purchases, and he also refused to complete his purchase, and brought an action, wherein he claimed as damages the expense which he had incurred in the investigation of the title, the profit which would have accrued from the resale of the property, the expense attending the resale, and the sums he was liable to pay to the sub-contractors for the expenses incurred by them in examining the title. It was held that he was entitled to recover only the expense he had incurred in the investigation of the title, and nominal damages for the breach of contract. That case, however, proceeded on the ground of the bona fides of the vendor, and on the understanding, which forms part of every contract of that description, that the vendor may not have it in his power to make a good title. *Bayley, J.*, there says, "The defendants undertook to make a good title, and they might honestly think that they should be able to do so. It turned out that they could not, and consequently that the contract was broken, and they were liable to an action. The plaintiff, however, must shew that the damages which he seeks to recover arose from the acts of the defendants, and not from his own haste." *Littledale, J.*, says, "When a contract for the purchase of land is made, each party cannot but know that the title may prove de-

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(a) 10 B. & C. 416.

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fective, and must be taken to proceed upon that knowledge." There is a broad distinction between the case of a party who contracts to sell an estate, subject to an inquiry as to title, and the case of a person who, having no title whatever, sells with warranty of title. In *Hopkins v. Grazebrook* (a), the defendant, who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him; and it was held, that a purchaser of certain lots at the auction, might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect. *Abbott, C. J.*, there says, "Upon the present occasion I will only say, that if it is advanced as a general proposition, that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point, I should desire time for consideration." The present case falls within the principle of that decision.

Montagu Chambers, in support of the rule.—The evidence was admissible in mitigation of damages. The plaintiff has no right to claim substantial damages for the loss of a bargain which he knew the other party had no power to make. *Hopkins v. Grazebrook* proceeded on the ground of the deception practised by the vendor in holding out the estate as his own, when in point of fact he had not a shadow of title. In all cases of vendor and purchaser, there is an implied agreement that the vendor will take his chance of the title turning out good, and for that reason damages are not recoverable. It is stronger here, since the plaintiff

(a) 6 B. & C. 31.

knew that the defendant had a defective title. The principle of the decision in *Flureau v. Thornhill* (a) is applicable to the present case. [Alderson, B.—In *Flureau v. Thornhill*, and *Walker v. Moore* (b), the defendants had reasonable ground for believing that they had a good title.] In *Johnson v. Johnson* (c), which was an action for money had and received to recover back the purchase-money of a parcel of land, from which the plaintiff was evicted in consequence of a defect of title, Lord Alvanley, C. J., said, that if he were to sue the vendors on the covenant to convey, he would only recover nominal damages.

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PARKE, B.—The rule must be discharged. The defendant contracted to grant a good and valid lease, and the learned judge was right in rejecting evidence which would go to alter the contract admitted by the plea.

The next question is, what damages is the plaintiff entitled to recover? The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of *Flureau v. Thornhill* qualified that rule of the common law. It was there held, that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law, and I am unable to distinguish it from *Hopkins v. Grazebrook*.

ALDERSON, B.—I am of the same opinion. The damages have been assessed according to the general rule of

(a) 2 W. Bla. 1078. (b) 10 B. & C. 416. (c) 3 Bos. & P. 162.

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law, that where a person makes a contract and breaks it, he must pay the whole damage sustained. Upon that general rule an exception was engrafted by the case of *Flureau v. Thornhill*, and upon that exception the case of *Hopkins v. Grazebrook* engrafted another exception. This case comes within the latter, by which the old common-law rule has been restored. Therefore the defendant, having undertaken to grant a valid lease, not having any colour of title, must pay the loss which the plaintiff has sustained by not having that for which he contracted.

PLATT, B.—Upon general principle, I cannot distinguish this case from *Hopkins v. Grazebrook*.

Rule discharged.

Jan. 26.

HESELTINE v. SIGGERS.

In an action for not delivering foreign stock, the declaration alleged that the plaintiff "bargained with the defendant to buy, and then bought from him, and the defendant then agreed to sell, and then sold to the plaintiff, certain foreign stock, to wit, 28,000 Spanish Active Stock, &c.:"—*Held*, that the words "bought" and "sold," must be construed

with reference to the subject-matter of the contract, and as meaning an agreement to buy and sell; and that a contract for the sale of Stock, Exchequer Bills, and securities of that description, in which the property passes by delivery, differs from a contract for the sale of a specific chattel, inasmuch as a contract for the sale of Stock, Exchequer Bills, &c., would be satisfied by the delivery of any stock or bills of the description bargained for, and consequently the contract for sale cannot mean an actual sale, but only a contract to deliver.

Such a contract is not within the 17th section of the Statute of Frauds, 29 Car. 2, c. 3.

ASSUMPSIT.—The declaration stated, that the plaintiff, at the request of the defendant, bargained with the defendant to buy from him, and then bought from him, and the defendant then agreed to sell, and then sold to the plaintiff, certain foreign stock, to wit, 28,000 Spanish Active Stock, representing a certain amount, to wit, the amount of £28,560 sterling, on certain bonds or certificates, at and after a certain rate or price then agreed upon between them, to wit, the rate or price of 26l. 5s. for every £100 of the said stock, the whole price of the said stock, at the rate aforesaid, being a large sum of money, to wit, £7497, to be paid in cash on delivery of the said bonds or certificates. And in consideration thereof, and that the plaintiff, at the

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request of the defendant, had then promised the defendant to accept the said bonds or certificates, and to pay for the said stock at the rate or price aforesaid, the defendant then promised the plaintiff to deliver him the said bonds or certificates within a reasonable time thereafter. And although the plaintiff was then, and at all times from the making of the said bargain and sale, to the time of the refusal of the defendant hereinafter mentioned, ready and willing to accept the said bonds or certificates, and to pay for the said stock according to the rate or price aforesaid, of which the defendant had then during all that time notice, yet the defendant did not, nor would, within a reasonable time after the making of the said bargain and sale, deliver the said certificates or bonds, or any of them, and afterwards, and after the expiration of a reasonable time for the delivery thereof, to wit, on &c., wholly refused to deliver the same, by reason whereof, and of the price of the said stock having in the meantime risen and advanced, the plaintiff not only lost and was deprived of divers great gains and profits, which might and otherwise would have accrued to him from the completion of the said contract, but the plaintiff, having then occasion for the said stock in the way of his trade and business as a dealer in such stock, was obliged to buy, and after the refusal of the defendant as aforesaid, and before the commencement of this suit, did buy, for the purpose of his said trade and business as such dealer, other Spanish stock of the same kind and description, to the amount, to wit, of £28,000, at a certain rate or price, much exceeding the said rate or price aforesaid, and thereby sustained and occurred a great loss, to wit, the amount of 464*l.* 2*s.*

The defendant pleaded "non assumpsit," with other pleas.

At the trial, before the Lord Chief Baron, at the London Sittings after Hilary Term, 1847, it appeared, that on the

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2nd of September, 1846, one Waley, as the agent of the defendant, sold to the plaintiff 28,000 Spanish Active Bonds at $26\frac{1}{4}$ per cent., to be delivered on the following day. The defendant refused to deliver the bonds, and the plaintiff, who after his purchase had sold the stock to another person, was in consequence obliged to purchase other bonds, at a loss of 464*L*. 2*s.*, the market price having risen in the meantime. The plaintiff gave in evidence a stamped sold note, signed by Waley, as agent for the defendant, but there was no evidence of any bought note. It was objected on the part of the defendant, first, that, the declaration being framed on an agreement to deliver bonds or certificates of stock sold, the plaintiff was bound to prove that the stock was actually sold, so that the property in the specific bonds passed to the plaintiff; secondly, that this was a contract for the sale of goods, wares, and merchandise within the 17th section of the Statute of Frauds, 29 Car. 2, c. 3, and that there was no sufficient note or memorandum in writing. The learned judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit.

Crowder, in last Easter Term, had obtained a rule nisi accordingly, against which,

Watson and *Hugh Hill* shewed cause in Michaelmas Term last, November 13th, and January 20th, in the present term.—The case of *Humble v. Mitchell* (*a*) is an authority to shew that this is not a contract within the 17th section of the Statute of Frauds. There the contract was in respect of shares in a joint-stock banking company, but there is no distinction in principle between such shares and this stock. But, assuming that the Statute of Frauds applies to this case, the note in writing, signed by Waley, as the agent of the defendant, was sufficient to satisfy its provisions. [*Pol-*

(*a*) 11 A. & E. 205.

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lock, C. B.—We are all of opinion that there is nothing in that objection.] Secondly, the evidence supported the declaration. In the case of *De Fries v. Littlewood* (a), which will be relied upon by the other side, the declaration alleged that the plaintiff, at the request of the defendant, bargained and agreed with the defendant to buy of, and the defendant then sold to the plaintiff divers goods at certain prices, &c.; but the evidence did not shew an agreement to buy any specific goods, but only an order for certain goods, to be executed by the defendant. If the words “bought and sold” were struck out of this declaration, it would still be good. This is not a contract for the sale of any specific shares, but of shares in a particular stock, and the contract would be satisfied by the delivery of any bonds of that stock. In an agreement for the sale of one hundred pounds stock, the subject-matter is specific, the quantum to be sold indefinite. The property in these bonds passes by delivery, and that distinguishes this case from *De Fries v. Littlewood* (a). In *Boorman v. Nash* (b), the declaration was in a similar form to the present. [*Parke*, B.—No doubt, for a long series of years, declarations have been in this form. I have drawn numbers myself, and never considered whether the contract passed the property or not.] In *De Fries v. Littlewood*, *Patteson*, J., says, “I am not sure that there may not be a sale, though an action for goods bargained and sold would not lie.” The terms “bought and sold,” have a mercantile signification, and mean, in this case, an “agreement to buy and sell.” The words “agreed to buy, and bought,” and “agreed to sell, and sold,” are to be found in the precedents in *Clift’s Entries* (c) and *Morgan’s Entries* (d). [*Parke*, B.—We cannot tell what the facts in those cases were: they may have been cases in which the property passed.] The words “agreed to buy, and bought,” must be construed according to the subject-

(a) 9 Jur. 938.

(c) 97 Pl. 80, 82.

(b) 9 B. & C. 145.

(d) Vol. 3, pp. 160, 161, 163.

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matter of the contract which relates to a certain portion of a debt due from a foreign state, the bonds being mere symbols, by handing over which, the portion of the debt which they represent is transferred. The declaration may be read as if it alleged that the plaintiff "agreed to sell, and so sold," &c. At all events, the Court will not grant a new trial, when the only result would be to impose additional costs. The distinction between the granting of a new trial, and a venire de novo, is pointed out by *Alderson, B.*, in *Hughes v. Hughes (a)*.

Crowder and *Thomas*, in support of the rule (*b*).—The ground of complaint is mis-stated in the declaration, which should have been framed on an agreement to sell. If it had set out bought and sold notes, and then alleged an agreement upon them, a mercantile construction might have been put on the terms "bought and sold." It is, however, distinctly averred, that the one bought and the other sold; so that no mercantile construction can be imported, but the words must receive their strict legal meaning. The word "sold" cannot be rejected as surplusage, but it implies a contract between the parties, by which the property in the particular thing passed. If the declaration had merely alleged that the plaintiff "agreed to sell," this form of action could not have been maintained. [*Parke, B.*—Does not the nature of the contract shew, that the words "bought and sold" cannot be construed, in the strict sense in which they are used, with reference to goods and chattels? Instead of being a contract for the sale of a specific chattel, it is a contract for the sale of bonds, which are transferable by delivery, and payable to bearer. Suppose a contract for the sale of Exchequer bills, would it be necessary to prove, upon such a declaration as this, certain specific bills, by the deli-

(a) 15 M. & W. 701.

(b) They abandoned the objection as to the Statute of Frauds.

very of which alone the contract would be satisfied?] It is submitted that it would. The contract should have been described according to its legal effect. The contract here set out could only be satisfied by the delivery of those specific bonds. They cited *Whitehouse v. Frost (a)*, *Atkinson v. Bell (b)*.

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POLLOCK, C. B., now said—In this case, we are of opinion that the rule ought to be discharged. The case of *De Fries v. Littlewood*, to which we were referred as having been lately decided in the Court of Queen's Bench, we have no intention to overrule. We are not, however, quite certain as to what was the exact point which was decided in that case; and, upon reference to one of the members of that Court, (Mr. Justice *Patteson*), the report, as it appears in print, is not confirmed by his view of the decision to which the Court came. But, whatever may have been the decision in that case, we are of opinion that the doctrine does not apply to Exchequer bills, bonds, scrip, Spanish stock, and securities of that description which pass by delivery merely. With reference, therefore, to articles of that description which become the subject of a contract, there is no difference between a contract to buy and a contract of actual sale, inasmuch as the transfer rests not so much on contract as on delivery; and as the meaning of the expression in the declaration must be construed with reference to the subject-matter, we therefore think that this objection is not valid. A sale in such a case as this means only a contract for sale, for the contract will be performed by the delivery of any goods of this description. There is this distinction to be observed between a contract to sell or for the sale of articles of this description, and contracts for a specific chattel, as to which a bargain has been made, and where the property may pass without any reference to any delivery at

(a) 12 East, 614.

(b) 8 B. & C. 277.

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all. Where there is a contract to sell particular and specific stock or bills, from the very nature of the thing, it is a contract, not for an actual sale, but a contract to deliver. The declaration, therefore, as to the subject-matter, is correct and proper, and is not open to the objection which was taken. The rule, therefore, must be discharged.

Rule discharged.

Jan. 26.

ROGERS and Others v. CHILTON.

To an action by indorsees of a bill of exchange against the drawer, the defendant pleaded, that the bill was indorsed by T. K. to plaintiffs, who, upon its becoming due, paid the amount thereof to plaintiffs, who received it in full satisfaction and discharge of the sum in the bill specified, and then delivered the bill to T. K., who had been ever since and was the holder at the commencement of the suit, and that, by virtue of the premises, defendant was liable to T. K. Replication, that plaintiffs were the holders of the bill at the commencement of the suit, without this, that T. K. was the holder, *modo et formâ*:—*Held*, on motion for a replender, that the issue raised by the replication was material.

ASSUMPSIT by the indorsee against the defendant, the drawer of a bill of exchange for £25, accepted by E. W., and payable, three months after date, to the order of the defendant, and by him indorsed to T. R. Kemp, and by Kemp to the plaintiffs.

Second plea, that the said indorsement in the declaration mentioned to have been made by T. R. Kemp was an indorsement made by the said T. R. Kemp in blank, and that, after the said bill of exchange was indorsed to the plaintiffs as therein mentioned, and on the day when the same became due and payable according to the tenor and effect thereof, to wit, on &c., the said T. R. Kemp paid to the plaintiffs the said sum of £25 in the said bill specified, according to the tenor and effect thereof, and of his indorsement thereof, in full satisfaction and discharge of the said sum of £25 in the said bill specified, and the plaintiffs then delivered the said bill to the said T. R. Kemp, who, from the time of such payment and delivery until, at, and after the time when this action was commenced, hath been and still is the holder of the said bill of exchange; and the defendant, by virtue of the premises, then became and was,

and is liable to pay the said sum in the said bill specified to the said T. R. Kemp. Verification.

Replication, that, at the time of the commencement of this suit, the plaintiffs were the holders of the said bill; without this, that, at the time of the commencement of this suit, the said T. R. Kemp was the holder thereof, modo et formâ; concluding to the country. Upon this replication issue was joined.

At the trial, before the Lord Chief Baron, at the London Sittings after last Michaelmas Term, the plaintiffs had a verdict for the amount of the bill of exchange.

Knowles, on the 14th of January, in the present term, moved for a rule calling on the plaintiffs to shew cause why there should not be a repleader.—The issue raised by the replication is immaterial. The plea alleges, that the bill was paid and satisfied when it became due, and that allegation is admitted by this form of replication; it therefore becomes immaterial whether Kemp was the holder of the bill at the commencement of the suit. Where a bill is paid in part on its arriving at maturity, the holder cannot recover of the acceptor more than the balance: *Bacon v. Searles* (a). Kemp might sustain the action against the defendant, although he had not the bill at the commencement of the suit.—He referred to *Stones v. Butt* (b), and Byles on Bills, p. 305. [*Parke*, B.—Is not the effect of this replication to deprive Kemp of any right of action against the present defendant?]

Cur. adv. vult.

POLLOCK, C. B., now said.—In this case we are of opinion that there ought to be no rule. There was an application for a repleader, on the ground that the issue raised by the replication to the second plea was immaterial. It was an action on a bill of exchange by the indorsees against the

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(a) 1 H. Bl. 88.

(b) 2 C. & M. 416.

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drawer, and the defendant pleaded that the bill was indorsed in blank by Kemp to the plaintiffs, and that, when it became due, Kemp paid the plaintiffs the amount in full satisfaction and discharge of the bill, and received it from them; and that since that time he had been, and at the commencement of the suit was, the holder, and that the defendant is liable to him. The plaintiffs replied, that, at the commencement of the suit, they were the holders of the bill, and that Kemp was not, in manner and form. It was argued, that this issue was an immaterial one; but we think that it is material, and therefore there will be no rule.

Rule refused.

Jan. 26.

In the Matter of JAMES RICHARD THOMPSON, Gent.

The Court refused to order an attorney to repay any portion of a premium of two hundred guineas received by him with an articulated clerk, who died within a month after he was articulated.

THIS was a rule calling on Mr. Thompson, an attorney of this Court, to shew cause why he should not repay a portion of the premium received by him with an articulated clerk. It appeared from the affidavits, that, on the 29th October, 1846, one W. E. Stevens articulated his son to Mr. Thompson for five years, on which occasion he paid to Thompson a premium of £210. On the 22nd of November, in the same year, the articulated clerk died.

Bovill shewed cause.—There is no authority in support of the present application. The cases of *Ex parte Prankerd* (a), and *Ex parte Bayley* (b), will perhaps be relied on. But in the former case the attorney had refused to receive back his apprentice, who had run away from his service; and on that ground the Court ordered him to return a rea-

(a) 3 B. & Ald. 257.

(b) 9 B. & C. 691.

sonable part of the premium. In *Ex parte Bayley* (a), the clerk had been articled to one of two attorneys in partnership, and, after serving for about two months, the attorney to whom he was articled died. The premium had been placed to the partnership account, and the survivor having two articulated clerks, and therefore not being able to retain in his service the clerk of his deceased partner, the Court thought that he ought to return a portion of the premium, since the clerk, though bound to the one only in name, was in conscience bound to the two. Those principles are inapplicable to the present case. The contract of service is for the period of five years; and while the father of the clerk sustains, by his death, a loss of the sum paid by way of premium, the attorney loses the advantage which he would otherwise derive from the value of the clerk's services during the last two or three years of the term. If the clerk had died at the end of the fourth year, would the attorney have had any remedy? In law, the father has no right to a return of any part of the premium, for the attorney has not committed any breach of contract; and the circumstances of the case present no equitable grounds for the interference of the Court. In *Cuff v. Brown* (b), the apprentice, after serving two years of his time, and without any misconduct on the part of his master, ran away and enlisted as a soldier. He was afterwards desirous of returning, but the master refused to receive him; and the Court held, that, under those circumstances, the master was not bound to return any part of the premium.

Watson, contra.—The Court has jurisdiction to entertain this application. It is conceded that no action will lie; but, in cases of this kind, the Court exercise a jurisdiction according to law and conscience, and are not bound by any technical rules: *Ex parte Bayley* (a). In *Ex parte Hayden* (c), the

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(a) 9 B. & C. 691. (b) 5 Price, 297. (c) Will., Vol. & Hod. 321.

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Court directed a surviving partner of an attorney to return part of the premium paid with a clerk who was articled before the partnership, it appearing that the relation of master and clerk had existed between the surviving partner and the clerk, and that part of the premium had been received by the former. *Ex parte Bennett* (a) is an authority to the same effect. In *Ex parte Bayley* (b) there was no breach of contract, but the decision proceeded on the ground, that, as the premium had been paid to the partnership account, the surviving partner was in conscience bound to return it. So here, the clerk having died within a month after he was articled, the attorney ought in fair dealing to return a portion of the premium. In *Ex parte Fisher* (c), *Abbott, C. J.*, says, "It is exceedingly convenient that there should be a summary jurisdiction in this Court for deciding differences between attorneys and their clerks of this description. The Legislature has given a summary jurisdiction to magistrates, as to apprentices of a different kind. This Court, and the other Courts of Westminster Hall, have, as far back as our practice will carry us, been in the habit of exercising a jurisdiction, as to differences of this nature, between an attorney of the court, who is an officer of the court, and his clerk. It seems to me that the exercise of that jurisdiction is a matter of great convenience, and I therefore think that we ought not to forbear doing what our predecessors have done." This premium has been paid in consideration of instruction during a period of five years; and it is the same in principle whether the instruction has been prevented by the death of the attorney or the death of the clerk.

Cur. adv. vult.

POLLOCK, C. B., now said—In this case a rule had been obtained by Mr. *Bovill*, against which Mr. *Watson* shewed

(a) 1 Will., Wol. & Dav. 210. (b) 9 B. & C. 691. (c) 1 Chit. 694.

cause a few days ago. It was a rule calling on Mr. Thompson to shew cause why he should not repay a portion of a premium which he had received with an articulated clerk, who had died shortly after he had been articulated. This is an application to the equitable jurisdiction of this Court, and, as there are great difficulties in the matter, we think the present application ought not to be granted. The rule therefore must be discharged.

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Rule discharged.

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THIS was a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriff of Middlesex, as to this action. It appeared from the affidavits, that on the 1st November, 1847, all the defendant's estates in Scotland, heritable and movable, were sequestered, under the 2 & 3 Vict. c. 41; and thereupon the Lord Ordinary granted the defendant a warrant of protection from arrest or imprisonment in Great Britain and Ireland, and her Majesty's other dominions, as to civil debts due and contracted previously to the date of sequestration, until a meeting of creditors for the election of a trustee of the sequestered estates. On the 1st December, 1847, a meeting of creditors was held at Lanark, and a trustee appointed; and it was then resolved that the protection should be renewed for three months. Accordingly, on the petition of the defendant, on the 16th December, a renewed warrant of protection was given him, signed by the sheriff-substitute of the Upper Ward of Lanarkshire. On the 25th January, 1848, the defendant was taken in execution in this action, which was for a debt due before the sequestration. An application had been made at Chambers to dis-

A renewed warrant of protection from imprisonment under the Scotch Sequestration Act, 2 & 3 Vict. c. 41, may be signed either by the sheriff or sheriff-substitute.

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charge the defendant out of custody, when *Rolfe*, B., dismissed the summons, on the ground that it did not appear that the sheriff-substitute was the proper person to sign the warrant of protection. The present application was fortified by an additional affidavit of a person conversant with the law of Scotland, who deposed that the county of Lanark was divided into three districts, to each of which was assigned a sheriff-substitute, who, within his ward, exercised all the powers and faculties of the sheriff-principal.

Temple shewed cause.—Under the 2 & 3 Vict. c. 41, “for regulating the sequestration of the estates of bankrupts in Scotland,” this warrant of protection should have been signed by the sheriff-principal, not by the sheriff-substitute. The interpretation clause (section 3) contains no provision that the word “sheriff” shall include “sheriff-substitute.” By the 13th section, on petition by a debtor, the Lord Ordinary is forthwith to award sequestration of the debtor’s estates, and to appoint meetings of creditors for the election of an interim factor, a trustee, and commissioners, and likewise remit to the “*sheriff*” and grant to the debtor a warrant of protection against arrest and imprisonment for civil debt, until the meeting of creditors for the election of trustee. The 27th section enacts, that, notwithstanding the remit to the sheriff, the process of sequestration shall be held to be in the Bill Chamber of the Court of Session; and on the remit being made, a copy of the petition for sequestration, &c., shall be transmitted by the petitioner to the sheriff’s clerk, &c., and the sheriff shall have as full power and jurisdiction as hitherto possessed by the Court of Session; and the sheriff-clerk, and messengers-at-arms, and officers of the sheriff’s court shall have power to act in their respective offices, under the act. The 45th, 46th, and 47th sections, which relate to the election of interim factor and trustee, clearly point to a distinction between the sheriff and the sheriff-substitute. The protection is claimed under the 58th

section, which provides, that the majority in number and value of the creditors "present at a meeting for the election of trustee may resolve that the personal protection of the bankrupt ought to be renewed for such time as they may think fit; and in such case the trustee shall apply to the *sheriff*, who shall renew the protection; and the deliverance by him renewing the same, or an extract thereof signed by the sheriff-clerk, shall have the same effect as the original warrant of protection."

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Montagu Smith, in support of the rule.—By the 45th section, the notice of meeting for the election of trustee may be given either to the sheriff or sheriff-substitute, and either may preside. The 66th section enacts, "that it shall be competent for the sheriff to grant a warrant to apprehend the bankrupt, and bring him *before the sheriff* for examination." It is evident, therefore, that the word "sheriff" must include sheriff-substitute; otherwise this absurdity would follow, that, when the meeting was presided over by the sheriff-substitute, the bankrupt could not be examined, nor have any protection granted him. [*Parke*, B.—On referring to the act, which passed in the year 1747, 20 Geo. 2, c. 45, it is clear that the term "sheriff" was meant to include sheriff-substitute. *Pollock*, C. B.—So, under the 54 Geo. 3, c. 137, either the sheriff or sheriff-substitute might have acted.]

PER CURIAM (a).—The rule must be absolute.

Rule absolute.

(a) *Pollock*, C. B., *Parke*, B., *Alderson*, B., *Platt*, B.

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CHAMBERLAINE v. THE CHESTER AND BIRKENHEAD RAILWAY COMPANY.

A declaration stated, that, before and at the time of the passing of the 1 Vict. c. cvii., the plaintiff was, and has ever since been, the owner of a ferry across the Mersey, from Tranmere, in the county of Chester, to Liverpool, and that by the said act the defendants were empowered to make a railway, with all necessary stations and works connected therewith, commencing at Brook-street, in the city of Chester, and terminating at or near a certain place, marked No. 34, in the plan deposited, as in the act of Parliament is mentioned, being at or near Grange-lane, in Birkenhead. It then

set out a section of the act whereby the company were prohibited from making a railway from the station at or near Grange-lane, to or to communicate with Woodside Ferry, until a branch railway should have been made from the main line to Birkenhead and Tranmere Ferries. The declaration then alleged that the defendants wrongfully and fraudulently, and for the purpose of evading the act, opened a railway from the station at Grange-lane to and to communicate with the shore of the Mersey, in the township of Birkenhead, between Woodside Ferry and Birkenhead Ferry, and near Woodside Ferry, and conveyed passengers and merchandise along the same to the said station at Grange-lane, although no branch railway had been made from the main line to Tranmere Ferry, in contempt of the act of Parliament and to the plaintiff's damage of 20,000*l.* On general demurrer:—*Held*, that the declaration was bad, as it did not contain any averment that the defendants made a railway to or to communicate with Woodside Ferry, or anything necessarily equivalent to such an averment. But, that if it had contained such an averment, the action might have been sustained without any allegation of special damage, the act prohibited not being one merely affecting the public, but an act obviously prohibited for the special protection of a particular individual.

CASE.—The declaration stated, that, before and at the time of the making and passing of a certain act of Parliament, made and passed in the first year of the reign of her Majesty, intituled “An Act for making a Railway from the City of Chester to Birkenhead,” the plaintiff was, and from thence hitherto hath been, and still is, the owner of a certain ferry across the river Mersey, called Tranmere Ferry, from a certain place called Tranmere, in the county of Chester, to Liverpool, in the county of Lancaster, and back again from Liverpool to Tranmere aforesaid; and that during all the time aforesaid there had been, and still were, certain other ferries across the said river Mersey, called respectively Woodside Ferry and Birkenhead Ferry; and that in and by the said act of Parliament the said company were empowered to make and maintain a certain railway, with all necessary and proper depôts, stations, approaches, water, and conveniences connected therewith, in the line or course therein mentioned or referred to, commencing at &c. in the city of Chester, and terminating at or near Grange-lane, in the township or extra-parochial chapelry of Birkenhead and county of Chester. And that in and by the said act of Parliament, after reciting that it would tend to the convenience of the public, and prevent serious injury to

the owners of Tranmere and Birkenhead ferries, if the accommodation for goods and passengers to and from the said railway, and the said several ferries of Tranmere, and Birkenhead, and Woodside, were kept equal, it was (amongst other things) enacted, that it should not be lawful for the said company to open any railway or tramroad, or any yard or depôt, from the said station at or near Grange-lane, or to communicate with Woodside ferry aforesaid, nor to allow any other company, or person or persons, to unite or to communicate, by means of any yard, depôt, railway, or tramroad, from the said Woodside ferry to the said railway thereby authorised to be made, or to convey any passengers, goods, or merchandise, which might have been conveyed from the said ferry called Woodside Ferry, by such railway, until a good and convenient branch railway, fit for the conveyance of passengers and goods by the same description of power, should have been made and opened from the said main line to the said ferries called Birkenhead and Tranmere respectively; such branch railways to be for ever thereafter maintained and kept in good repair, by and at the expense of the said company, or other person or persons making the same. Provided always, that it should not be lawful for the said company to use or employ any locomotive engine upon the said railway, between the said station and the said Woodside Ferry, unless branches should be made, upon which locomotive engines might equally be used, between the said station and the said ferries of Birkenhead and Tranmere; nor to fix any stationary engine for working the said line between the said station and Woodside Ferry, until a similar engine should have been erected by the said company for the use of the said ferries respectively. Yet the defendants, wholly disregarding their duty and the said act of Parliament, afterwards, and after the passing of the said act of Parliament, to wit, on &c., and on divers other days between that day and the commencement of this suit, fraudulently and for the purpose of evad-

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ing the said act of Parliament, and their duty in that behalf, opened a certain railway, or tramroad, from the said station at or near Grange-lane to and to communicate with the shore of the said river Mersey, at a certain part thereof between the said ferry called Woodside Ferry, and the said ferry called Birkenhead Ferry, and near to Woodside Ferry aforesaid; and during all the time aforesaid, conveyed by the said railway, called the Chester and Birkenhead Railway, divers passengers, goods, and merchandise, which had been conveyed over the said river Mersey to the said part of the shore thereof, near to the said station at or near Grange-lane aforesaid, and by the said railway, or tramroad, so made by the defendants, as last aforesaid, although no branch railway whatsoever, fit for the conveyance of passengers and goods by the same description of power, at any of the times aforesaid, had been or was, or yet hath been or is, made or opened from the said main line to the said ferry called Tranmere Ferry. And the defendants, further disregarding their duty and the said act of Parliament, afterwards, to wit, on &c., and on divers other days and times, &c., did use and employ divers, to wit, fifty locomotive engines upon the said railway or tramroad between the said part of the shore of the said river Mersey, near to and within the limits of the said Woodside Ferry, although no branch, at any of the times aforesaid, was or yet hath been made upon which locomotive engines might be equally used between the said station and the said ferry called Tranmere Ferry: in contempt of the said act of Parliament, &c.

General demurrer, and joinder.

The case was argued in Easter Term, 1847, (May 8), by

Sir *F. Kelly* (with whom was *Crompton*), in support of the demurrer.—The whole question in this case turns on the

construction to be put upon the act of Parliament set out in the declaration, the 1 Vict. c. cvii, s. 11. The Chester and Birkenhead Railway Company are thereby forbidden to open a branch railway, from their terminus at Grange-lane, *to or to communicate with* Woodside Ferry, untill they shall have made also branch lines to the ferries of Birkenhead and Tranmere. But this declaration merely alleges, that they have made a branch line to the shore of the river Mersey, "at a part thereof between the said ferry called Woodside Ferry, and the said ferry called Birkenhead Ferry, and *near to* Woodside Ferry," although no branch railway has been made to Tranmere Ferry. There is nothing in the act of Parliament which prohibits them from doing that. The term "*near to*" is entirely vague, and has no legal meaning. Westminster Abbey is *near to* Westminster Hall; Hertford is *near to* London. So far as appears upon this record, to which alone the Court can look, Tranmere Ferry may be much more *near to* the branch line made by the defendants than Woodside is. The term may mean a yard or a mile off. It is, therefore, perfectly consistent with the declaration, that the branch railway may in fact have been carried to a point so near to the plaintiff's ferry, that he is benefited instead of being injured thereby. Under such circumstances, the declaration does not disclose any right of action. There is no prohibition against the company's bringing their railway to the river *between* Woodside and Birkenhead ferries. It is no breach of an act of Parliament, where the thing prohibited is not *malum in se*, to evade the prohibition by doing something *nearly approaching to* the thing prohibited. It is clear that but for this section the plaintiff would have no right of action whatever against the defendants for extending their railway over their own land, or that of any other person, to any point on the shore of the river. The action is founded entirely upon the statute, and by it the company are not *enabled* to do anything, but only *prohibited* from doing a particular act, namely, opening

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a branch to or to communicate with Woodside Ferry, until they have also opened branches to the other ferries. Of that prohibition no breach is stated in this declaration. Nor is the case altered by its being alleged that the act was done fraudulently, and with intent to evade the statute: *In re Evans* (a). Further, the case of *Iveson v. Moore* (b) shews that the plaintiff ought to have stated special damage, to entitle him to sue in such a case. [Parke, B.—The original act of Parliament gives the company no power to go beyond the terminus at Grange-lane. The question is, whether the clause in question is not an *enabling* one, empowering them to go on to the shore of the Mersey, under the restrictions therein stated.] It surely is a prohibitory, and not an enabling clause: they did not require an enabling clause for this purpose; for they might clearly have gone on to the shore of the river, either over their own land, or that of any other person with his consent, without an act of Parliament.

The *Attorney-General*, (*Welsby* with him), contra.—This company is a corporation for the purposes mentioned in their act of Parliament, and for those only, that is, for making a railway from Chester to a certain place in Birkenhead, and the necessary works connected therewith, and they can do nothing beyond what they are thereby permitted and enabled to do. They are a qualified, not a general corporation, and have no right to construct any works, or to do any act not permitted by the legislature. The clause in question, therefore, though prohibitory in form, is in effect an enabling clause. It says to the defendants:—"If you will contemporaneously make branch railways to the Birkenhead and Tranmere ferries, you may go to Woodside Ferry." And the present action is maintainable, not on the ground that the defendants have been guilty of a breach

(a) 2 C. M. & R. 206.

(b) 1 Salk. 15.

of a public duty, but on the ground that they have fraudulently evaded an act of Parliament, passed for the double purpose of the public convenience, and the protection of private rights. The plaintiff is not driven to contend that an indictment might have been sustained. The act of Parliament recognises the right of the plaintiff, and the breach of that recognised right gives him a title to sue, without shewing special damage. The meaning of the act of Parliament is this, that if the defendants go to Tranmere and Birkenhead ferries, then they may go to Woodside, but that unless they do so, they cannot go to the shore at all; and if they do that fraudulently, an action lies unless they go to all the three ferries. It is a contract on their parts, to consult at once the public convenience, and the private rights of the ferry-owners, by going to the three ferries if they go to any. [*Parke, B.*—The question is, whether they are not bound to keep up the communication equally with the three ferries.] Yes. It is analogous to an action on the case for evading a market toll, by fraudulently selling outside but near to the market: *Bridgland v. Shapter (a)*. The case of *Pim v. Curell (b)* shews that the owners of Woodside Ferry might have sued for the establishment of a ferry *near to*, but in fraud and to the injury of Woodside Ferry.

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Sir *F. Kelly* replied.

Cur. adv. vult.

The judgment of the Court (*c*) was now delivered by

POLLOCK, C. B.—The question in this case arises on a demurrer to the declaration. The declaration states that, at and before the time of the passing of the act 1 Vict. c. cvii, intituled &c., the plaintiff was and has ever since been owner

(a) 5 M. & W. 375.

(b) 6 M. & W. 234.

(c) *Pollock, C. B., Parke, B., Rolfe, B., and Platt, B.*

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of a ferry across the Mersey, from Tranmere, in the county of Chester, to Liverpool; and that, by the before-mentioned act of Parliament, the defendants were empowered to make a railway, with all necessary stations and works connected therewith, commencing at Brook-street, in the city of Chester, and terminating at or near a certain place marked No. 34 in the plan deposited as in the act of Parliament is mentioned, being at or near Grange-lane, in Birkenhead; and it then sets out fully the 11th section of that act, as follows: [His Lordship read the section]. And the declaration then alleges, that the defendants, wrongfully and for the purpose of evading the act, opened a railway from the station at Grange-lane to and to communicate with the shore of the Mersey, in the township of Birkenhead, between Woodside Ferry and Birkenhead Ferry, and near Woodside Ferry, and conveyed passengers and merchandise along the same to the said station at Grange-lane, although no branch railway had been made from the main line to Tranmere Ferry, in contempt of the act of Parliament, and to the plaintiff's damage of £20,000. To this declaration the defendants have put in a general demurrer; and the question therefore is, whether the declaration discloses a good cause of action. In support of the demurrer, the defendants argued, first, that even if the acts of the company complained of had been clear violations of the provisions contained in the statute, still no right of action would thereby have accrued to the plaintiff, without alleging special damage; and secondly, that the declaration does not shew that the defendants have in any respect violated the provisions of the statute.

With respect to the first point, there is no doubt as to the general rule. Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove, that the doing of the act prohibited has

caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage; and this is undoubtedly the case here, for the 11th section, by necessary inference, must be taken to contain a legislative declaration that it would occasion damage to the owner of Tranmere Ferry if the company should make a branch railway to Woodside Ferry, without at the same time making another to Tranmere Ferry; and the act, therefore, says, with the object (*inter alia*) of guarding the owner of Tranmere Ferry from such a damage, that it shall not be lawful for the company to make the one railway without at the same time making the other also. Under these circumstances, we think that, in an action by the owner of Tranmere Ferry, it would be sufficient to state that the defendants had made a railway to or to communicate with Woodside Ferry without at the same time making another to or to communicate with Tranmere Ferry, and that such a statement would sustain the action, without the averment of any special damage. It is not, however, necessary for us to give our positive judgment on this point, for we are all of opinion that this declaration does not contain any averment that the defendants have made a railway to or to communicate with Woodside Ferry, or anything necessarily equivalent to such an averment. The allegation is, that they have fraudulently, and for the purpose of evading the act, opened a railway from the Grange-lane station to and to communicate with the shore of the Mersey, at a spot between Birkenhead Ferry and Woodside Ferry, and near to Woodside Ferry. The question is, whether this is equivalent to saying that they have opened a railway to or to communicate with Woodside Ferry, and we think it certainly is not. The expressions *unlawfully*, *fraudulently*, and

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to *evade the act* are of no avail, if in truth what is stated to have been done is not prohibited. If, indeed, the defendants, in order to evade the prohibition, had made a railway communicating with the river, not strictly at Woodside Ferry, but so near to it as to draw all the traffic by that course, and so occasion to the plaintiff the injury against which the 11th section meant to protect him, it may be that proof of these facts would have well sustained an averment, that the defendants had made a railway communicating with Woodside Ferry, and that, in such a case, the analogy of cases relating to the infringement of patents for inventions would have applied. But when we are called on to interpret the record, we can admit no such latitude of construction. All we know is, that the defendants have made a railway communicating with the shore of the Mersey *near* to Woodside Ferry. The word "*near*" has no precise meaning. It may be near to Woodside Ferry, but at the same time much nearer to Tranmere, and its effect may have been, not to benefit Woodside at the expense of Tranmere, but to benefit Tranmere at the expense of Woodside. We have, it must be observed, no judicial knowledge of the relative positions of the three ferries; it may be, therefore, that Tranmere is the middle ferry, and then the allegation that the place where the defendants have communicated with the shore of the river is between Birkenhead Ferry and Woodside Ferry, will be consistent with its also being between Tranmere and Birkenhead, and so with its being beneficial to them, and injurious to Woodside. It may be, also, that the place of communication, though near to Woodside, is still nearer to Tranmere, that it is in fact close to Tranmere, so as to give to that ferry nearly the same benefit as a railway actually communicating with it; or it may be that the point of communication with the shore of the river is some fourth ferry, some ferry close to the Grange-lane station, and with which the legislature did not mean to prevent a communi-

cation. All these considerations would have been of no avail, if the declaration had stated what amounted in terms to an infringement of the act of Parliament. But not doing so, we must look very scrupulously to what is alleged, and finding, as we do, that the allegations are consistent with many views of the case, not involving any violation whatever of the provisions contained in the 11th section, we think that the plaintiff has failed to state a cause of action. It must however be understood, that we are not all of us prepared to say that, if it appeared on this record that the communication which the company made with the shore of the river Mersey had taken away or injured the traffic of the three ferries, the action could not have been maintained. Our judgment therefore is for the defendants.

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Judgment for the defendants.

—◆—
NIGHTINGALL v. SMITH (a).

THE following case was sent by his Honor the Vice-Chancellor of England, for the opinion of this Court.

In the month of February, 1807, William Hough purchased from John Fisher certain freehold hereditaments, which hereditaments were described in the indenture of feoffment, dated the 2nd day of February, 1807, by which the same were conveyed to the said William Hough, in manner following, that is to say: "All that messuage or

Devise of "all that my messuage or dwelling-house, outbuildings, garden, lands, and appurtenances, in which I now live, at Higher Tranmere; also the croft, close, or inclosure of ground situate at Tranmere aforesaid,

which I have lately purchased, with the two cottages erected thereon." At the time of his will, the testator occupied a dwelling-house, outbuildings, stable, and garden at Tranmere. He *had* occupied also four closes of land, in all eleven acres, which he had bought at the same time with the dwelling-house, outbuildings, stable, and garden; but a year before the date of his will he had given up the occupation of those closes. He did not occupy any other lands in Tranmere, besides what would be comprised within the terms "dwelling-house, outbuildings, and garden."—*Held*, that the four closes of land passed by this devise.

(a) This case was decided in Michaelmas Term, 1846, but has been accidentally omitted in the reports of that period.

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dwelling-house, with the stable and garden thereto belonging, situate in Tranmere, in the county of Chester; and also all those two closes, closures, or parcels of land, situate in Tranmere aforesaid, and called or known by the name or names of the Town Field and the Grange Way, or by whatsoever other name or names the same, or either of them, then were or theretofore had been called, known, or distinguished, containing in the whole, by common estimation, six acres and a half of the large Cheshire measure, or thereabouts." And in the month of January, 1836, the said William Hough purchased from Andrew Jones other freehold hereditaments, which hereditaments were described in the indentures of lease and release, dated the 6th and 7th days of January, 1836, by which the same were conveyed to him, in manner following, that is to say: "All that close or parcel of land situate in Higher Tranmere aforesaid, bounded on the north by land belonging to George Orred, Esquire; on the south by the road leading to Prenton; on the east by the highway leading through the village of Tranmere; and on the west by an occupation road, and then in the occupation of Richard Kenrick. And also all those two messuages, cottages, and dwelling-houses, with the appurtenances then lately erected thereon by the said Andrew Jones, and then in the occupation of Joseph Wilkinson and Richard Latham, and their appurtenances."

Higher Tranmere is part of the parish of Tranmere, and the hereditaments so as aforesaid purchased in February, 1807, as well as those purchased in January, 1836, were situate in Higher Tranmere.

The said close called the Town Field was divided by the said William Hough into three closes, and such three closes, and the close called the Grange Way, (being together four closes), contained eleven acres, three roods, and thirty-eight perches, of statute measure.

The said William Hough, by his will, bearing date the

8th day of February, 1837, and duly executed and attested in the manner then required by law for the devise of freehold hereditaments, gave and devised as follows; viz. "I give and devise unto William Nightingall, Robert Nightingall, and John Nightingall, the sons of my niece, Mary Nightingall, all that my messuage or dwelling-house, outbuildings, garden, lands, and appurtenances, in which I now live, at Higher Tranmere aforesaid, the pew and vault in St. Catherine's Chapel, in Tranmere aforesaid, and my pew situate in the parish church of Bebbington, in the county of Chester aforesaid, now in the occupation of George Smith; also the croft, close, or inclosure of ground, situate at Tranmere aforesaid, which I have lately purchased, with the two cottages or dwelling-houses erected thereon, in the occupation of Joseph Wilkinson and — Eccles, as tenants thereof, and to their heirs and assigns for ever, to hold the same as tenants in common, and not as joint tenants, subject to an annuity of £50 to their father and mother during their joint lives, and to the survivor of them during the term of his or her life, payable in the same manner, and under the same powers and directions, as the annuity given to Alice Ollerton; but provided Brereton Nightingall, the husband of my said niece, Mary Nightingall, shall survive his said wife, the aforesaid annuity of £50 shall be paid to him so long only as he shall continue sole and unmarried; and subject also to the payment of £250 each to the daughters of my said niece, Mary Nightingall, within twelve months next after my decease; but in case any of them shall happen to die during my lifetime leaving lawful issue, then I direct the mother's share shall be paid to such child, if only one, and if more than one, to and amongst them, share and share alike; and provided any of the said daughters of my said niece, Mary Nightingall, shall die without leaving lawful issue, then I direct that the share of such daughter so dying shall be equally divided amongst the daughters surviving, or their issue, share and

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share alike, the share or shares of £250 each to such daughters as shall be under age to be put out to interest, such interest to be applied towards her or their maintenance and support until they come of age."—A copy of the whole will is annexed to and is to be taken as part of this special case.

The testator died on the 7th day of June, 1839, without having revoked or altered his said will.

• The words "in which I now live, situate at Higher Tranmere aforesaid," in the said testator's will, are interlined in such will between the words "All that my messuage or dwelling-house, outbuildings, garden, lands, and appurtenances," and the words "the pew and vault in St. Catherine's Chapel, in Tranmere aforesaid."

The said testator was not, at the time of the execution of his will, seised of or entitled to any lands situate in Higher Tranmere, other than the lands purchased in 1807 and 1836, and so described respectively as hereinbefore mentioned.

The said testator occupied the whole of the hereditaments purchased in 1807, consisting of the said messuage or dwelling-house, outbuildings, stable, and garden, and the said four closes, containing 11A. 3R. 8P., for seventeen years before and down to the month of February, 1836, when he sold his farming stock, and let three of the said four closes to one tenant, and the fourth to another tenant, and such closes were thenceforth, until the said testator's death, in the occupation of the testator's tenants, and the said testator continued to occupy the said messuage or dwelling-house, outbuildings, stable, and garden, down to the time of his death.

The value, at the date of the testator's will, of the said messuage or dwelling-house, outbuildings, stable, and garden, was £800; and the value of the said croft and cottages purchased in 1836 was, at the date of the said testator's will, £500; such two sums making together the sum

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of £1300. The said testator's niece, Mary Nightingall, had seven daughters, to each of whom the sum of £250 was given by the said testator's will, which sums were by such will made charges upon the hereditaments devised to the three sons of the said Mary Nightingall as aforesaid; and the sums so charged amounted together to the sum of £1750; and the hereditaments so devised as aforesaid were by such will charged with an annuity of £50 to the said Mary Nightingall and her husband Brereton Nightingall, during their joint lives and the life of the survivor, determinable (in the event of the said Brereton Nightingall surviving) upon his marriage, the value of which annuity, at the date of the said testator's will, calculated according to the government tables, was the sum of £741; such sums of £1750 and £741 making together £2491.

All the estate and interest of the said William Nightingall, under the said devise, in all the hereditaments comprised in such devise was, at the time of the contract afterwards stated, vested in Brereton Nightingall.

In the month of February, 1844, John Smith contracted with the said Brereton Nightingall, Robert Nightingall, and John Nightingall, for the purchase of the said four closes of land, formerly two closes called the Town Field and the Grange Way, but the said John Smith objected to complete the purchase of the same premises, and he alleged, that, according to the true construction of the said testator's will, such four closes did not pass by the devise so as aforesaid contained in such will, and therefore that the vendors could not make a good title thereto; but the said Brereton Nightingall, Robert Nightingall, and John Nightingall, considering that such four closes did pass by such devise, filed their bill in the High Court of Chancery against the said John Smith for a specific performance of the said contract, and by an order of his Honor the Vice-Chancellor of England, made in such cause on the 20th day of February,

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1846, it was ordered that a case should be stated for the opinion of the Barons of her Majesty's Court of Exchequer. The question being, whether the said four fields or closes at Higher Tranmere, containing 11A. 3R. 38P., or thereabouts, formerly two closes called the Town Field and the Grange Way, passed under the devise contained in the will of the said William Hough to William Nightingall, Robert Nightingall, and John Nightingall, the devisees therein named.

The case was argued in Trinity Vacation, 1846 (a), by

Hodgson, for the plaintiff; and *Roundell Palmer*, for the defendant.

The Court took time to consider, and the judgment of the Court was afterwards (Nov. 20, 1846) delivered by

PARKE, B.—The question in this case is, what is the meaning of the following passage in the testator's will:—"And I give and devise to William, Richard, and John Nightingall, all *that* my messuage or dwelling-house, outbuildings, garden, *lands*, and appurtenances, in which I now live, at Higher Tranmere aforesaid, the pew and vault in St. Catherine's Chapel, in Tranmere aforesaid, and my pew situate in the parish church of Bebbington, in the county of Chester aforesaid, now in the occupation of George Smith; also the croft, close, or inclosure of ground, situate at Tranmere aforesaid, which I have lately purchased, with the two cottages or dwelling-houses erected thereon, in the occupation of Joseph Wilkinson and — Eccles, as tenants thereof, their heirs and assigns, for ever, to hold the same as tenants in common, and not as joint tenants, subject to an annuity of £50 to their father and mother during their joint lives, and subject also to the payment of £250 each

(a) July 1, before *Parke*, B., *Alderson*, B., and *Platt*, B.

to the daughters of my said niece, Mary Nightingall, within twelve months next after my decease."

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The facts, which are properly stated in the case, and which are admissible in evidence, in order to enable the Court to place itself in the situation of the testator, and to construe his will, are these:—At the time of his will, February, 1837, the testator occupied a dwelling-house, outbuildings, stable, and garden, at Tranmere. He had occupied, besides, four closes of land, 11A. 3R. 38P., which he had bought in 1807, at the same time with the dwelling-house, outbuildings, stable, and garden; but a year before the date of his will, he had given up the occupation of the land. He did not occupy any lands then besides what would be comprised within the terms "dwelling-house, outbuildings, and garden." The charges in the will amounted altogether to £2491. The value of the dwelling-house, outbuildings, and gardens, was £800; and of the land purchased in 1836, was £500; but if the four are added, the value would exceed the charges—all these values being computed at the date of the will. With the aid of these extraneous circumstances, or such as are material, we must construe the devises in the will. We do not rely on the circumstance that the charges would exceed the value of the lands, if the dwelling-house, outbuildings, and garden, and the land purchased in 1836, alone passed by the devise, because they afford a very uncertain criterion of the testator's intention, as distinguished from the meaning of the words used; for his notion of value may be different from that of others, from his own peculiar knowledge or temperament. We proceed, therefore, to construe the words of the bequest independently of the last-mentioned circumstance, and ascertain their meaning, applying to them the ordinary and well-established canons of construction.

Upon reading the will itself, and without reference to the surrounding circumstances, it is obvious that the testator means to devise *lands*, besides what would pass under the

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designation of "dwelling-house, outbuildings, and garden." It is clear, also, that the terms "in which I now live" could apply to lands only in a secondary or improper sense, for no one could live in "lands." He may, however, be said to do so, if he occupies lands attached to a dwelling-house in which he lives, or of which the dwelling-house was the homestead; and if in this case it had appeared that some of the testator's lands in Tranmere (other than the after-purchased croft or close, with two cottages, which are separately devised) were so occupied, and if his other lands there were not, the former only would have passed, according to the maxim, "*Verba non debent accipi in demonstrationem falsam, quæ competunt in limitationem veram*:" that is, if there be some lands in which all the demonstrations are true, and some wherein part are true and part false, then shall there be intended words of true limitation to pass only those lands where all the circumstances are true: Bacon, 13th maxim. But here it appears that there were no "lands" whatever so occupied; and consequently that maxim does not apply. The question comes to this, whether any lands at all, besides the croft or close purchased in 1836, passed by this devise.

This must depend upon the question, whether there is a devise of a thing certain; for if it be, the addition of an untrue circumstance will not vitiate the devise, according to the legal maxim, "*Falsa demonstratio non nocet*." "Another certainty put to another thing which was of certainty enough before, is of no manner of effect," says Plowden, 191; "and there is a diversity where a certainty is added to a thing that is uncertain, and where to a thing certain; as if I release *all my lands* in Dale, which I have by descent on the part of my father, and I have lands in Dale on the part of my mother, but no lands by descent on the part of my father, the release is void; and so the words of certainty added to the general words have effect; but if the release had been of Whiteacre in Dale, which I have by descent on the part

of my father, and it was not so, the release would be valid, for this thing was certainly enough expressed by the first words, and the last words were superfluous and of no effect." If the thing has substance and certainty enough, the untrue description is of no avail.

Now, in this case, the words shew that the testator clearly contemplated a certain house—"all *that* messuage," and *certain lands*, (other than the after-purchased croft). The will may be considered to be the same as if the testator had said, "all that dwelling-house and all those my lands in Tranmere, (other than the croft lately purchased), and in which house and in which lands I now live." In such a case, the principle, that the addition does not vitiate the devise, would apply.

We are therefore of opinion, that the lands, being the four fields or closes in question, did pass, and have so certified to his Honor the Vice-Chancellor.

Certificate accordingly.

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PRINCIPAL MATTERS.

ACCORD AND SATISFACTION.

See PLEADING, III, (5).

Agreement by Creditors to accept Composition.

To counts by drawer against acceptor of two bills of exchange for £30 and 41*l.* 16*s.*, the defendant pleaded, as to 13*l.* 3*s.* 2*d.*, parcel of the sum of £30 in the first count, and also as to the second count, that he the defendant was in embarrassed circumstances, and indebted to the plaintiff in respect of the causes of action in the introductory part of the plea mentioned in the sum of 54*l.* 19*s.* 2*d.*, and to one B. in a certain other sum of money, and was unable to pay the plaintiff and B. their debts in full; and thereupon the defendant agreed with the plaintiff and B. to pay them respectively, and the plaintiff and B. then mutually agreed with each other and the defendant to accept of him, 10*s.* in the pound as a composition upon and in full satisfaction and discharge of their respective debts. The plea then averred readiness and willingness to pay, with a tender of the amount of the composition, and concluded with payment of it into court. The plaintiff replied, traversing the agreement

to accept the composition of 10*s.* in the pound in satisfaction and discharge; upon which issue was joined. At the trial the agreement proved was to accept a composition of 10*s.* in the pound, payable in *certain sums on certain days*. It also appeared that default had been made in payment of the instalments. The learned judge, at the request of the defendant's counsel, amended the plea accordingly:—*Held*, that the plea as amended was bad, even after verdict, for not stating that the payments were made at the precise times agreed on, or at least a tender made of them.

Semble, that, if the plea had been that a new mutual agreement between plaintiff, defendant, and other creditors, binding on each at the time when it was made, was given as a substitution for, or in satisfaction of, the debt due from the defendant to the plaintiff, such plea would have been good, and in that case it would have been for the jury to decide whether the plaintiff agreed to accept the *agreement* itself, not the performance of it, as a satisfaction for his debt.

A judge at Nisi Prius ought not to amend a pleading, if the effect of the amendment would be to render the pleading demurrable. *Evans v. Powis*, 601

AFFIDAVIT.

See PLEADING, II, (1).
PRACTICE, (3).

(1). *Jurat.*

An affidavit sworn before a commissioner, omitting in the jurat the words "before me," is bad. *Graham v. Ingleby*, 651

(2). *To Hold to Bail.*

An affidavit to hold to bail, which states that the defendant "before and at the time of the commencement of this suit was, and still is, justly and truly indebted to the deponent in £100 for work done, and materials for the same provided, and goods manufactured and made by the deponent for the defendant, and at his request," is bad. *Pontifex v. De Maltsoff*, 436

AMENDMENT.

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ANNUITY.

(1). *Statement of Consideration in Memorial.*

The plaintiff had advanced to the defendant several sums, amounting to £5000, less the sum of £250, which C., the agent of both parties, improperly retained without the authority or knowledge of the plaintiff; and C. received five bills of exchange accepted by the defendant, to the amount of £5000, by way of security; the dates of the bills did not exactly correspond with the dates of the advances, nor were the advances in the exact sums for which the bills were given. The plaintiff accepted an annuity from the defendant, in satisfaction of the bills and the £5000 secured thereby. The memorial, under the title "consideration, and how paid," was to this effect:—£5000 made up of five several

sums of £300, £200, £2000, £1500, and £1000, previously lent and advanced by the plaintiff to or for the use of the defendant and E. J. L., and owing to the plaintiff on security of five several bills of exchange drawn by E. J. L. upon and accepted by the defendant, and indorsed by E. J. L., the said consideration being paid or satisfied by the cancellation of the same bills; and a release by the plaintiff of the defendant and E. J. L. from the sum secured thereby, and interest:—*Held*, that the memorial, as required by the 55 Geo. 3, c. 141, was sufficient; for that it is not necessary, in the case of existing bygone debts, to state when and how each sum constituting the debt was advanced. *Hall v. Lack*, 300

(2). *Power to charge Annuity payable out of "Suitors' Fund."*

A judge at chambers having made an order under the 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1, charging an annuity payable out of the "Suitors' Fund," by order of the Lord Chancellor, in pursuance of the provisions of the 46 Geo. 3, c. 128, this Court, considering it doubtful whether or no the judge's order was valid, refused to set it aside, as, by so doing, they would deprive the party of the right of appeal.

Quare, if this Court has jurisdiction over an order of that description? *Witham v. Lynch*, 391

ARBITRATION.

See PLEADING, I, (4).

(1). *Effect of Order of Reference restraining either Party from bringing an Action.*

An order of reference contained a clause restraining either party from bringing or prosecuting any action or suit in any court concerning the premises referred to—*Held*, that the find-

ing of the arbitrator was conclusive, and that the plaintiff could not afterwards move for judgment non obstante veredicto. *Britt v. Pashley*, 64

(2). *Insufficiency of Award.*

An action, together with all matters in difference, were referred to arbitration. The arbitrators awarded *generally* that a certain sum was due from the defendants to the plaintiffs. The Court discharged a rule calling on the defendants to shew cause why they should not pay to the plaintiffs the sum so awarded. *Rule v. Bryde*, 151

(3). *Application to set aside Award.*

In a cause which had been referred to arbitration by an order of Nisi Prius, the arbitrator made an award in favour of the defendant, who thereupon signed judgment. The plaintiff obtained a rule to set aside the award, notice of which was served upon the defendant. The defendant afterwards, and before the argument of the plaintiff's rule, obtained a judge's order to stay all further proceedings until the plaintiff should have given security for costs:—*Held*, that the Court could not entertain the application for setting aside the award whilst this order remained in force. *Badham v. Badham*, 824

ARTICLED CLERK.

See ATTORNEY, (5).

ASHES.

Meaning of Term in Metropolitan Paving Act.

A brassfounder, having extracted a quantity of metal from ashes which fell into the ash-pit during the process of casting, was accustomed to give the refuse, in which some metal still re-

mained, as a perquisite to his apprentices, by whom it was sold to brass-refiners, who extracted from the ashes a further quantity of metal:—*Held*, that the ashes, being available for a commercial purpose, were not "dust, cinders, or ashes," withing the meaning of the Metropolitan Paving Act, 57 Geo. 3, c. xxix. *Law v. Dodd*, 845

ASSIGNEE OF BANKRUPT.

See PLEADING, III, (4).

ATTORNEY.

See OVERSEERS.

(1). *Unauthorised Appearance by.*

Where a defendant has been served with process, and an attorney without authority appears for him, the Court will not interfere to set aside the proceedings, if the attorney be solvent, but will leave the defendant to his remedy by summary application against the attorney. If the attorney be insolvent, the Court will relieve the defendant on equitable terms, if he has a defence on the merits.

But where a plaintiff, without serving a defendant, accepts the appearance of an unauthorised attorney for the defendant, the Court will set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs, and the expense to which he has been put, from the delinquent attorney by summary proceedings. *Bayley v. Buckland*, 1

(2). *Delivery of Bill.*

In an action on an attorney's bill against a member of the provisional committee of a railway company, it appeared that the plaintiff, who was employed as local agent and attorney, sent his bill to the residence of the solicitor of the company, who laid it

on one occasion before the committee when the defendant was present, and on another occasion it was laid before the committee by the secretary when the defendant was absent:—*Held*, a sufficient delivery of the bill within the 6 & 7 Vict. c. 73, s. 37. *Eggington v. Cumberledge*, 271

(3). *Taxation of Bill.*

C., an attorney in London, employed B., also an attorney in London, to defend a person indicted at Cambridge for bribery at an election there. In the years 1841 and 1842, B. delivered to C. two bills of costs, and in the year 1847 he delivered copies of the bills duly signed:—*Held*, that the bills were taxable under the 6 & 7 Vict. c. 73, s. 37. *Billing v. Coppock*, 14

(4). *Striking off Roll.*

An application to strike an attorney off the rolls of the court, will not be granted upon the mere production of a similar rule obtained in another court, unless there be an affidavit that he is the same person; and the application should not be made on the last day of term. *In re —*, 453

A rule to strike an attorney off the roll of this court, on affidavit that he has been convicted of a misdemeanor in the Queen's Bench, and struck off the roll of that court, is a rule nisi, which makes itself absolute, unless cause be shown within the time prescribed. *In re Charles Wright*, 658

(5). *Return of Premiums paid with Articled Clerk.*

The Court refused to order an attorney to repay any portion of a premium of two hundred guineas received by him with an articled clerk, who died within a month after he was articulated. *In re Thompson*, 864

AUDITA QUERELA.

(1). *Rule for Supersedeas and Venire Facias.*

In an audita querela, the Court granted a rule absolute for a supersedeas, together with a venire facias. *Giles v. Hutt*, 59

(2). *Pleading several Matters in.*

An audita querela is an "action or suit" within the 4 Anne, c. 16, s. 4, and a defendant may plead several matters thereto. *Giles v. Hutt*, 701

AWARD.

See ARBITRATION.

BAIL.

See AFFIDAVIT, (2).
PRACTICE, (3).

BANKING CO-PARTNERSHIP.

See SCIRE FACIAS.

BANKRUPTCY.

(1). *Notice of Act of.*

A notice given by a trader, that he has filed a declaration of insolvency, pursuant to 5 & 6 Vict. c. 122, s. 22, where a fiat in bankruptcy issues within two months from the filing of such declaration, is a sufficient notice to deprive the execution creditor of the benefit of 2 & 3 Vict. c. 29, s. 1, so that he is not entitled to the proceeds of goods levied after the notice, but before the fiat issued. *Green v. Laurie*, 335

(2). *Right of Surety to recover Money paid after Bankruptcy of Principal.*

Where the plaintiff, the defendant, and another person were co-sureties for A. by a joint and several promissory note payable on demand, and the plaintiff paid less than his share before

the defendant's bankruptcy, but subsequently more than his proper proportion—*Held*, in an action by him for one-third of the sum paid, that the case was not within the 52nd section of 6 Geo. 4, c. 16, as the plaintiff was not a "person liable for" the bankrupt's debt, and therefore that he was entitled to recover the sum so claimed. *Wallis v. Swinburne*, 203

BILL OF EXCHANGE.

See INFANT, I, (5).

PLEADING, I, (5), III, (2).

PROMISSORY NOTE, (3).

Action by Payee of lost Bill.

The payee of a negotiable bill of exchange, having lost it, cannot, without producing it, maintain an action for the recovery of its amount against the acceptor upon its arriving at maturity.

Drawer of bill of exchange payable to his own order *v.* acceptor. Plea, that after acceptance, and before action, plaintiff lost the bill, and that it still remains lost, and that plaintiff was not then, nor now is, the holder or possessor of it. Replication, that the bill had never been indorsed, nor was it transferable by delivery, or capable of being enforced or put in suit against defendant by any other person than plaintiff; that plaintiff, up to the commencement of the suit, was alone entitled to be the holder, and to receive the amount of it from the defendant, of which defendant at the commencement of the suit had notice:—*Held*, on demurrer to the replication, that defendant was entitled to judgment. *Ramus v. Crowe*, 167

BILL OF SALE.

See EVIDENCE, (3).

BOTTOMRY.

Right of Owner of Cargo to Indemnity.

The master of a ship damaged by

perils of the seas, hypothecated at a foreign port, by one bottomry bond, for necessary repairs, the ship, freight, and cargo, amongst which were the plaintiff's goods. The ship and freight realised less than the sum borrowed, and the plaintiff was obliged to contribute towards the difference, and also to pay his proportion of the costs of a suit instituted in the Court of Admiralty by the obligee of the bond:—*Held*, that the plaintiff might maintain an action against the owner of the ship on an implied promise to indemnify; also, that a plea stating that the bond was executed by the master without express authority from the defendant, and that when the same was executed, the cost of repairs exceeded the value of the ship and freight, and as soon as the defendant had notice he abandoned the ship and freight, and never did ratify the act of the master, was bad on general demurrer. *Duncan v. Benson*, 537

BUILDING SOCIETY.

(1). *Loans on Mortgage to Members.*

A benefit building society, established under the provisions of the 6 & 7 Will. 4, c. 32, is not precluded from lending money on mortgage to its own members. *Cutbill v. Kingdom*, 494

(2). *Construction of Rules.*

One of the certified rules of such society provided, that no action should be brought or defended until the approbation of the majority of the members present at a "special meeting" of the society should be obtained:—*Held*, no objection that the approbation of the majority was obtained at a "special general meeting."

Another rule provided, that a committee should determine all disputes which should arise respecting the construction of the rules of the society, or any of the clauses, matters, or

things therein contained, and also of any additions, alterations, or amendments which should or might thereafter arise between the trustees, officers, and other members of the said society:—*Held*, that the trustees might, notwithstanding, bring an action against a member for the amount of his subscriptions and fines. *Cutbill v. Kingdom*, 494

(3). *Amount of Interest of each Member.*

Semble, that, under the 6 & 7 Will. 4, for the regulation of benefit building societies, the legislature intended that no one member should acquire a larger interest than £150 in respect of his share or shares in such society. *Ib.*

CARRIER.

See DAMAGES, (2).

CHARTERPARTY.

Effect of Statement of Time when Vessel sailed.

To an action for not loading a vessel in pursuance of the terms of a charterparty, the defendant pleaded, setting out the whole of the charterparty, which stated, that it was agreed between the plaintiff, "original charterer of the good ship or vessel called *The Dove*, A 1, of the measurement of 149 tons, or thereabouts, *now at sea, having sailed three weeks ago, or thereabouts*," and the defendant, that the ship, being tight, staunch, &c., should proceed to Marseilles, (after having delivered her cargo at Genoa), and there load certain goods of the defendant, and therewith proceed to a safe port in the United Kingdom, calling at Cork or Falmouth for a certain rate of freight; thirty working days to be allowed, Sundays excepted. The plea then averred, that time was an essential and material part of the contract; and the probable

situation of the vessel with reference to the date of her sailing, and the object of her voyage, was also an essential and material part of the contract, and that, in point of fact, at the time of the making the charterparty, the vessel had not sailed three weeks, but a materially and unreasonably later time, of which the defendant had no notice or knowledge, for which cause the defendant neglected and refused to load the vessel:—*Held*, that the time at which the vessel sailed was material, that that statement in the charterparty amounted to a warranty, and that the defendant was entitled to retain his verdict upon the plea, on motion for judgment non obstante veredicto.

Semble, per *Parke, B.*, that the averment that the plaintiff knew the time the vessel sailed, was immaterial. *Ollive v. Booker*, 416

CHINA.

See COMMISSION AGENT.

COAL-MINE.

See COVENANT.

COGNOVIT.

See PRACTICE, (8).

COMMISSION AGENT.

(1). *Construction of the Words "You may invest"—"Proceeds."*

The plaintiffs, merchants in England, consigned to the defendants, commission agents in China, certain goods to be disposed of under the terms of a letter containing the following passage:—"If tea is not obtainable at our limits, you may invest one-half of the whole proceeds in silk, at prices &c. . . . If silk is obtainable much below these prices, you may substitute it in part for tea, even if the latter is to be had within our limits, at your discretion:—"—*Held*,

that, upon the true construction of the above passage, as read with the whole of the letter, the words "you may invest" were directory, and did not leave the matter to the discretion of the agents.

The declaration stated, that, in consideration that plaintiffs at London would consign to defendants at China certain goods for sale and receipt of the proceeds there by defendants, on account of the plaintiffs, for reward in that behalf, defendants promised to invest and remit the said proceeds to plaintiffs at London, within a reasonable time after receiving the said proceeds, by purchasing, to the amount of £500, any other article than tea and silk, if defendants thought fit; and that, if tea could not be bought by defendants, and silk could, within certain prices agreed upon, and if defendants did not purchase any other article than tea and silk, then that defendants would purchase silk to the extent of half the said proceeds; that defendants afterwards received the goods and sold them, and received the proceeds thereof; and, while they held them for more than a reasonable time, that defendants did not invest any part of the proceeds in any other article than tea or silk; and that while they could have bought silk, and could not have bought tea, within the prices agreed upon, defendants did not invest the said half part of the said proceeds in silk, within the prices agreed upon, for more than a reasonable time after the receipt of the said proceeds, &c. Plea, that, after defendants received the proceeds of the goods consigned, they could not have bought silk at the prices specified, *modo et formâ*; concluding to the country: upon which plea issue was joined:—*Held*, that, upon the true construction of the term "*proceeds*," in the issue raised by this plea, the question was, not whether defendants

could have bought silk at China, at the prices agreed upon, after the *whole* proceeds had been received by them, but whether they could have bought silk at China at those prices after they had received a part or parts of the proceeds, for the remittance of which more than a reasonable time had elapsed from the period when they first began to receive such part of the proceeds as was considerable enough to be remitted. *Entwisle v. Dent*, 812

(2). *Meaning of Term "Net Proceeds."*

The following letter was addressed to an African captain and supercargo by his employers:—"Your commissions are £6 per cent. on the *net proceeds* of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz. £4 per ton from the gross sales of the oil when taken from the quay, and 4*l*. 15*s*. when warehoused:—*Held*, that the commission was payable only on the sums actually realised, after deducting bad debts as well as other charges. *Caine v. Horsfall*, 519

CONDITION PRECEDENT.

See COVENANT.

COPYHOLD.

See LAND-TAX REDEMPTION ACT.

COSTS.

See ARBITRATION, (3).

ATTORNEY, 1.

INTERPLEADER ACT.

NATIONAL DEFENCE ACT.

PRACTICE, (6).

SMALL DEBTS ACT, (3).

(1). *Of several Issues.*

To a declaration containing three common counts, the defendant pleaded the general issue, and two special

pleas. Each plea was directed to the whole declaration. The plaintiff had a verdict as to part of his demand on the first issue, and the defendant as to the residue. The second issue was found for the plaintiff, and the third for the defendant:—*Held*, that, as the defendant was entitled to the *postea* and the general costs, he was entitled to the costs of all witnesses attending to prove the third issue, whether their evidence applied to any other issue or not, and that he was also entitled to the costs of those who appeared to reduce the plaintiff's demand on the first issue, unless they attended to negative the second; that the plaintiff was entitled to the costs of the witnesses who appeared solely to prove the issues found for him under the first issue, and also the second issue, both or either of them. *Welby v. Brown*, 770

(2). *In Trespass.*

To a count of trespass *qu. cl. fr.* upon three closes, the defendant pleaded several pleas; the plaintiff new assigned trespasses *extra viam* as to the third close, to which the defendant pleaded not guilty. The defendant had a verdict upon some of the issues with respect to the first and second closes, and the plaintiff upon others, so that the defendant succeeded as to the causes of action in those closes: the plaintiff had a verdict, with one farthing damages, upon the new assignment. There was no certificate under 3 & 4 Vict. c. 24:—*Held*, that the causes of action in that count were divisible; and that, under the 4 & 5 Ann. c. 16, ss. 4, 5, the plaintiff was entitled to the costs of the issues found for him, with respect to the causes of action in the first and second closes; but that he was deprived of all costs, by 3 & 4 Vict. c. 24, with respect to the cause of action for trespasses in the third close. By the

one statute the defendant is punished for pleading pleas which he cannot support; and by the other, the plaintiff is punished for bringing a frivolous action, in which he succeeds. *Sharland v. Loaring*, 375

(3). *Notice of Taxation.*

A notice of taxation of costs, dated the 23rd of February, to attend the following day, was left at the office of the plaintiff's attorney between seven and eight o'clock of the evening of the 24th:—*Held*, that the notice was sufficient. *Grant v. Mackenzie*, 12

COUNTY COURT.

See SMALL DEBTS ACT.

COUNTY GAOL.

See SURGEON OF.

COVENANT.

See BUILDING SOCIETY.

LANDLORD AND TENANT.

LIQUIDATED DAMAGE.

PARTIES TO ACTION.

Condition Precedent.

Declaration in covenant stated, that plaintiff, by indenture, granted to defendant all the coals, and mines of coal, under certain lands; that defendant covenanted to pay the plaintiff, as the price of the coal so granted, £40 for every statute acre of the said coal which should be *found* under the said lands, and, until the said price should be fully paid, to pay plaintiff £40, part of the said price, in each year, by two equal half-yearly instalments, whether the whole of an acre of coal should be gotten in every such year, or not. Averment, that, at the time of the making of the indenture, *there were* under the said lands divers, to wit, fourteen acres of coal; and that divers, to wit, thirteen acres of the said coal still remained under the

said lands, and that £40 for two of the half-yearly instalments of the said price for the coals aforesaid became due, and still was in arrear and unpaid, to the plaintiff:—*Held*, on error in the Exchequer Chamber, reversing the judgment of the Court of Exchequer, that the *finding* of coal was not a condition precedent to the plaintiff's recovering the annual sum of £40. *Jowett v. Spencer*, 647

Covenant. Declaration, after stating that plaintiff and defendant had agreed to enter into partnership as surgeons and apothecaries, until January 1, 1846, defendant agreeing to pay plaintiff £800, and to be entitled to all the profits of the business, &c., proceeded to state, that it was agreed that plaintiff should, after the 1st of January, introduce defendant as his successor in the business, and use his best endeavours to establish him in it; and defendant in consideration thereof covenanted to pay plaintiff the further sum of £50 on the 25th of March, 1846, in addition to and beyond the said sum of £800, &c. Breach, non-payment of the sum of £50. Plea, that, after the 1st of January, and before the said 25th of March, plaintiff refused and neglected to introduce defendant as plaintiff's successor to &c., and would not use his best endeavours to establish defendant in his business; wherefore defendant refused to pay the £50. Verification:—*Held*, that the plea was bad, as the introduction of the defendant by plaintiff to his patients was not a condition precedent to the payment of the £50. *Judson v. Bowden*, 162

DAMAGES.

See LIQUIDATED DAMAGE.

- (1). *In Action for Breach of Agreement to grant a Lease by Party having no Title.*

Where a party agrees to grant a

good and valid lease, having full knowledge that he has no title, the plaintiff, in an action for the breach of such agreement, may recover, beyond his expenses, damages resulting from the loss of his bargain; and the defendant cannot, under a plea of payment of money into court, give evidence that the plaintiff was aware of the defect of title. *Robinson v. Harman*, 850

- (2). *In Action against Carrier for Non-delivery of Goods within reasonable Time.*

The plaintiff sent certain goods by the defendants, carriers, to be delivered in Bedford on a Thursday, in order to be ready for the market on Saturday, but did not give notice that they were sent for that purpose: on that day his clerk proceeded there, and, owing to the non-delivery of the goods till the Monday following, he removed them to another place for sale:—*Held*, in an action for the non-delivery of the goods within a reasonable time, that the expenses so incurred might be given by the jury as damages. *Black v. Baxendale*, 410

- (3). *Where Two Persons are jointly sued for False Imprisonment.*

Where two persons are jointly sued for false imprisonment, one of whom has acted from improper motives, the damages ought not to be assessed with reference to the act and motives of the most guilty or the most innocent party, but the true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass. *Clark v. Newsam*, 131

DE INJURIA.

See PLEADING, IV, (2).

DETINUE.

See PLEADING, I, (6).

DEVISE.

(1). "*Survivor or Survivors,*" *how to be construed.*

A testator devised three several estates to his three daughters, M., C., and L., for their respective lives, with remainder to their children, as tenants in common in fee: provided, that, if any or either of them should die without issue, the property given to such daughter should go and accrue to the "*survivors or survivor,*" in equal shares, as tenants in common; and if all except one should die without issue, then the shares of such daughters so dying should go to the "*survivor,*" her heirs and assigns for ever. On the 3rd October, 1841, C. died, leaving a son. On the 25th October, 1841, L. died, without having had issue. On the 22nd December, 1841, M. and her husband conveyed to a trustee, as well the property devised to her for life as that devised to L., to hold to the use of M., for the joint lives of herself and her husband, with remainder to the survivor in fee:—*Held*, that the word "*survivor*" in the will must be construed according to its ordinary meaning; and that, on the death of L., the property given to her for life vested absolutely in M. in fee.

Also, that the son of C. could, under no contingency, become entitled to any interest in the property given to M. for life.

Also, that, under the will and deed, the husband of M., in her right, had an estate in possession during the joint lives of himself and his wife. *Lee v. Stone*, 674

(2). *Construction of Proviso.*

P. J., by his will, dated in 1779, left large real estates to his wife for life; and after her death, to his daughter D., wife of Sir J. E., for her life; and after her death, to her eldest son, R. E., for his life; and after his death,

to the first and other sons of R. E. severally and successively, and the heirs of their respective bodies; and for default of such issue, to the testator's grandson, M. J. E., the second son of his daughter, in case he should not become seised of certain estates (devised by M. D.); and after the death of M. J. E., the testator devised the said estates, upon the conditions aforesaid, to the first and other sons of M. J. E. severally and successively, to their heirs respectively and successively; and, in default of such issue, he devised his estates, on the like conditions as aforesaid, to the third and every other son of his daughter, severally and successively, and their heirs. And the testator declared, that, if the said M. J. E., or any son of his daughter, should, at any time during his life, become seised of the real estates (devised by M. D.), then M. J. E., or such son of his daughter so becoming entitled, or any heir of his body, should not take any interest in the testator's estates, but they should go over to the next son of his daughter and his heirs, with a clause for re-vesting the estates in the son so displaced, on certain contingencies.

Provided "always, that, if it shall happen that my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled by the true meaning of this my will to my real estates, hereby limited and settled as aforesaid, then and in either of those cases, I devise all my said real estate, subject respectively as aforesaid, to all the daughters, if more than one, of the body of my said daughter who shall be living at her death, as tenants in common, and their heirs respectively, with cross remainders amongst them, in case of any one or more of them happening to die under the age of twenty-one years, and without issue; and if there should be but one such

daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs. Provided always, that, if any such daughter or daughters of my said daughter shall happen to die in her or their said mother's lifetime, leaving issue, then my will is that such issue of each such daughter so dying, and the heirs of such issue respectively, shall have and take the estate, or share or shares of estates, as the parent or parents of such issue respectively would have been entitled to if she or they had been living at the decease of my said daughter."

The proviso then concluded by devising the estates to those persons to whom the daughter might please to leave them by will, in case she should leave no issue male at her death; and in case she should not make any will, the estates were to go to the testator's heirs. The daughter, D., died in 1792, in the testator's lifetime, leaving two sons, R. E. and M. J. E., and several daughters. The testator died in 1796, when his widow became possessed of the estates, and died in 1810. At her death, R. E. became possessed of the estates until his death, which occurred in 1844; M. J. E. died in 1841; both died without issue:—*Held*, that the words "*living at her death*," in the preceding proviso, were to be read as connected with the verb "*shall have*," and referred to both members of the sentence in the commencement of the proviso; and, consequently, as the testator's daughter, at the time of her death, had issue male entitled to the testator's estates, the daughters of the testator's daughter took no estate or interest under the will. *Wilson v. Eden*, 772

(3). *Words sufficient to pass Fee-simple.*

The following devise was held to

pass an estate in fee-simple:—"I devise and bequeath all my real and personal estate, monies, securities for money, and all other my real and personal estate, of what nature or kind soever and wheresoever the same may be, which I am now possessed of, or which at any time hereafter I may be possessed of or entitled unto, subject to the payment of all my just debts, funeral and testamentary expenses, and the expense of proving this my will, unto my dear wife Catherine, to and for her sole and separate use and benefit." *Doe d. Roberts v. Williams*, 414

(4). *When "Estate" does not pass the Fee—Issue.*

A testator devised as follows:—"I give to my wife Nanny all that house, shop, and garden now in the tenure of B., for her own sole use and purpose; and I also give to my wife Nanny all that messuage, farm, and premises now in the holding of C., to hold to her, my said wife, during the term of her natural life; and from and after her decease, I give and devise the said messuage or tenement, and also the said farm and premises, given to my said wife for her life as aforesaid, to my son John. I give and bequeath to my son George the lease of the farm I rented of Lord L., for his own use and benefit; and I also give to my son George that one acre of copyhold land I bought of G., and also half an acre of freehold land adjoining that one acre of copyhold land." The will contained other devises, and at the end was this passage:—"And I give and bequeath and order the rents or interests that is behind, due, and unpaid shall go and be paid to that person I have left the *estates and properties* respectively to. As to all the rest, residue, and remainder of my property whatsoever, and of what nature or kind soever, I give, devise, and

bequeath the same to be equally divided between and amongst my said wife Nanny and her children who have issues, share and share alike:”—*Held*, first, that a fee in the lands devised did not pass to George; for, though the word “estate,” in the operative part of a will, passes not only the corpus of the property, but all the interest of the testator in it, unless controlled by the context, yet where that word is not used in the operative clause of the devise itself, but is introduced into another part of the will referring to it, such word cannot be construed as having the effect of extending the meaning of the operative clause, whether prior or subsequent.

Secondly, that the children of the wife who had no issue at the death of the testator did not take any interest under the residuary clause. *Doe d. Burton v. White*, 526

(5). *When “Estate” does not pass Real Property.*

The word “estate” in a will does not of necessity include real property, but its meaning must be taken as explained by the context. Thus, where a testator, after devising certain real estates by his will, proceeded, “I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, estate and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my death,” unto certain executors, in trust, to dispose of the same as specified by the will:”—*Held*, that the word “estate” did not pass real estate. *Sanderson v. Dobson*, 141

(6). *On Trust to pay and apply Rents during Life of Cestui que Trust.*

To trespass for breaking and en-

tering the plaintiff’s close, the defendant pleaded—1st, the user of a right of way for twenty years; 2ndly, a user of the way for forty years. Replication to the former plea, that the corporation of L., being seised in fee of the locus in quo, by indenture of feoffment demised it to H. for three lives and twenty-one years; that the corporation delivered seisin to H., who became and was seised of the said close during the period of twenty years in the said plea mentioned, and the said term so demised was existing in full force, and not expired, surrendered, or otherwise become void. The replication to the other plea stated, in similar terms, the demise of the locus in quo by the corporation of L. to H., and then alleged that H., being so seised of the locus in quo, by indenture between C. of the first part, H. of the second part, and M. and W. of the third part, granted to M. and W. a right of way over the locus in quo. Rejoinder to replication to first plea, that the said term so demised was not existing during the period of twenty years in that plea mentioned, modo et formâ. Rejoinder to replication to second plea, that H. did not grant to M. and W. the right of way, modo et formâ. At the trial, it appeared that the corporation of L., being seised in fee of the locus in quo, by indenture of the 17th February, 1800, demised it to H. for three lives and twenty-one years. By indenture of the 23rd July, 1803, after reciting the above indenture, H. assigned to C. the demised premises for securing payment of £1200, lent by C. to H. By indenture of the 9th February, 1804, after reciting the demise to H. by the corporation, the assignment by H. to C., and also reciting that H. had agreed to sell part of the land to M. and W. for a sum out of which the sum due from H. should be paid to C.; C., at the request of H., bar-

gained, sold, assigned, and transferred, and H. *granted*, bargained, sold, assigned, and transferred, to M. and W. part of the demised premises, together with the right of way in question. In 1812 H. died, having made his will, whereby, after bequeathing his estates to his wife for life, he devised the same, after her death, to J. and M., in manner following, "upon trust to pay and apply the rents, issues, and profits of the same to and for the life and benefit of my daughter Mary, and her assigns, during her life, and independent of her present or any future husband; and from and after the decease of my said daughter, I give, devise, and bequeath my real and leasehold estates as aforesaid unto and equally among all and every the children of my said daughter Mary, share and share alike, as tenants in common; and if the said Mary shall die without leaving lawful issue her surviving, then I give, &c. the same to my grand-daughter Ann." In 1816 the wife of H. died, and, by indenture of the 11th December, 1817, the corporation of L. assigned to the trustees the reversion in fee-simple of the locus in quo.

Held, first, that the plaintiff was entitled to a verdict on the rejoinder to the replication to the first plea, since the trustees under the will of H. took only an estate during the life of the testator's daughter, and therefore the lease for lives did not merge in the grant of the reversion.

Secondly, that the rejoinder, "ne granta pas," only put in issue the fact of a grant, and that the seisin of H. was admitted. *Cooke v. Blake*, 220

(7). "*Lands*" *misdescribed passing*.

Devise of "all that my messuage or dwelling-house, outbuildings, garden, *lands*, and appurtenances in which I now live, at Higher Tranmere; also the croft, close, or inclosure of ground

situate at Tranmere aforesaid, which I have lately purchased, with the two cottages erected therein." At the time of his will the testator occupied a dwelling-house, outbuildings, stable, and garden at Tranmere. He had occupied also four closes of land, in all eleven acres, which he had bought at the same time with the dwelling-house, outbuildings, stable, and garden; but a year before the date of his will he had given up the occupation of those closes. He did not occupy any other lands in Tranmere, besides what would be comprised within the terms "dwelling - house, outbuildings, and garden:"—*Held*, that the four closes of land passed by this devise. *Nightingall v. Smith*, 879

DISTRINGAS.

See PRACTICE, (1).

DUPLICITY.

See PLEADING, III, (9).

EQUITY OF REDEMPTION.

See PLEADING, III, (5).

ERROR CORAM VOBIS.

See PRACTICE, (10).

EVIDENCE.

See EXCISE, (1).

GUARANTEE, (2).

LIMITATIONS (STATUTE OF).

RAILWAY COMPANY, I, (3).

WITNESS.

(1). *Of Payment*.

Where the defendant, in answer to a letter demanding payment, sent a post-office order, in which the plaintiff was described by a wrong Christian name, and the plaintiff kept it, but did not cash it, although he was informed

at the post-office he might receive the money at any time by signing it in the name of the payee—*Held*, that this was no evidence of payment. *Gordon v. Strange*, 477

(2). *Of Rent due.*

In an action against a sheriff for negligence in not levying under a writ of fi. fa., the defence was that the sheriff had withdrawn on notice from the landlord that rent was due. At the trial the landlord stated that rent was due, but on cross-examination it appeared that the execution debtor held under a lease which was not produced :—*Held*, that the fact of rent being due could not be proved without production of the lease, and that the plaintiff was entitled to a verdict. *Augustien v. Challis*, 279

(3). *Admissibility of Bill of Sale without Schedule.*

On the trial of an interpleader issue, the plaintiff tendered in evidence a bill of sale and schedule, the former of which assigned to him "all the goods, fixtures, household furniture, plate, china, &c., in and about a messuage, tenement, and premises, where he now resides, and being No. 2, Park Road, Old Kent Road, in the county of Surrey, and the chief articles whereof are particularly enumerated and described in a certain schedule hereunto annexed." The schedule was in no way annexed to the deed, and was inadmissible for want of a stamp :—*Held*, that the bill of sale was admissible in evidence without the schedule. *Dyer v. Green*, 71

EXCISE.

(1). *Maltster—Penalty.*

By stat. 7 & 8 Geo. 4, c. 52, s. 33, a maltster is liable to a penalty for treading or forcing together in the couch-frame any grain making into

malt. The 1 Vict. c. 49, s. 5, enacts, that any excise officer, upon suspicion of the grain having been trodden or forced together, may throw the grain out of the couch-frame, and return it and lay it level in the couch-frame; and if any increase in the gauge of the grain shall be found, exceeding a certain proportion, then the increase so found shall be taken as *conclusive evidence* that the grain has been trodden or forced together, and the maltster shall thereupon be convicted in a penalty. Upon an information before justices against the defendant for the penalty, it appeared that the excise officer had, in pursuance of an order of the commissioners of excise, returned the grain by piling it in a cone in the centre of the couch, and then distributing it equally to all parts of the couch. The increase in the grain when thus returned having exceeded that allowed by the act, the defendant was convicted :—*Held*, that the increase in the grain found by such a mode of returning it was *conclusive evidence* of the offence within the 7 & 8 Geo. 4, c. 52, s. 33, as it did not appear that the mode of proceeding was unfair or improper, and consequently the conviction was right; and that the officer has some, if not an absolute, discretion to exercise in the matter, provided he does not use it improperly. *Reg. v. Speller*, 401

(2). *Sweet Spirits of Nitre—Meaning of the Term "Spirits."*

Sweet spirits of nitre are not "spirits" within the meaning of the excise acts, 6 Geo. 4, c. 80, ss. 107, 133; 7 & 8 Geo. 4, c. 53, s. 32; 2 Will. 4, c. 16, s. 10. Therefore a person who buys from one who is not a licensed distiller, and without a permit, sweet spirits of nitre, the duty on which has not been paid, is not liable to the penalties imposed by those statutes.

The term "spirits" in those acts signifies an inflammable liquid produced by distillation, either pure, or mixed only with ingredients which do not convert it into some article of commerce not known in common parlance under the general appellation of "spirits." *Att.-Gen. v. Bailey*, 281

EXCHEQUER BILLS.

See FOREIGN STOCK.

EXECUTOR.

See PLEADING, II. (2).

PRACTICE, (9).

PROMISSORY NOTE, (3).

FERRY.

See RAILWAY COMPANY, (3).

FOREIGN STOCK.

Meaning of Words "bought" and "sold."

In an action for not delivering foreign stock, the declaration alleged that the plaintiff "bargained with the defendant to buy, and then bought from him, and the defendant then agreed to sell, and then sold to the plaintiff, certain foreign stock, to wit, 28,000 Spanish Active Stock, &c.:"—*Held*, that the words "bought" and "sold" must be construed with reference to the subject-matter of the contract, and as meaning an agreement to buy and sell, and that a contract for the sale of stock, Exchequer bills, and securities of that description, in which the property passes by delivery, differs from a contract for the sale of a specific chattel, inasmuch as a contract for the sale of stock, Exchequer Bills, &c., would be satisfied by the delivery of any stock or bills of the description bargained for, and consequently the contract for sale cannot

mean an actual sale, but only a contract to deliver.

Such a contract is not within the 17th section of the Statute of Frauds, 29 Car. 2, c. 3. *Heseltine v. Siggers*. 856

FRAUDS (STATUTE OF).

See FOREIGN STOCK.

GUARANTEE.

(1). *Consideration.*

A declaration stated, that L. made his promissory note payable to the plaintiff: that the note being in the plaintiff's hands overdue and unpaid, in consideration that the plaintiff would forbear and give time to L. for payment of the note, to wit, *for a reasonable time*, the defendant promised to pay the note, in case L. should make default. It then alleged that L. made default, and that defendant did not pay the amount of the note. Plea, non assumpsit. At the trial, it appeared that the defendant, having agreed to guarantee the payment of the note by L., indorsed on the back thereof as follows:—"I guarantee the payment of the within note by L., the maker, on the 2nd November next." On that day, the note being due and dishonoured, the defendant signed the following memorandum, addressed to the plaintiff:—"Sir, I request you will hold over the promissory note in your favour, of L., dated 31st July, 1844, for £200, at three months, and in consideration of your so doing, I undertake to continue in all respects my guarantee of the same."—*Held*, that the guarantee was defective; also, that there was no evidence to support the declaration.

Seem, that the declaration was bad, in stating the consideration to be forbearance to sue for a *reasonable time*. *Semple v. Pink*, 74

(2). *Admissibility of Evidence to explain Ambiguity in.*

In an action on the following guarantee, "In consideration of your having this day advanced to our client, Mr. V. D., £750, secured by his warrant of attorney, payable on the 22nd of August next, we hereby jointly and severally undertake to pay the same on default, &c. Dated the 20th of June, 1840," the declaration stated, that, in consideration that the plaintiff would, on the 22nd of June, 1840, lend to one V. D. £750, on the security of a warrant of attorney, payable on the 22nd of August then next, and would forbear and give time to V. D. until the 22nd of August, the defendant promised &c. :—*Held*, that the instrument was sufficiently ambiguous to admit of evidence to shew that the advance was not a past one, but was made simultaneously with the execution of the guarantee, and that no amendment of the declaration was necessary. *Goldshede v. Swan*, 154

HERIOT.

See PLEADING, IV, (1).

INFANT.

Ratification of Promise by.

Assumpsit by indorsee against indorser of a bill of exchange, with counts for money lent, &c. Plea, infancy. Replication, that defendant, after he became of age, by memorandum in writing, signed by him, ratified and confirmed the contracts and promises. Issue thereon. The defendant, after he became of age, wrote to the plaintiff the following letters :—"I should feel particularly obliged if you would arrange to keep the bills back for a little time, as my late brother's executors have lost their mother and only sister lately, and which prevents them from settling with you. The money

INSURANCE.

will be shortly paid, say £2000."—"The bills drawn out by Mr. B. and me, and my acceptances, one for £1500 and the other for £500, due on the 1st January last, will most likely be settled shortly, and would have been settled before, had not a sudden accident occurred, which prevented their being paid."—"I beg to inform you that I have this day forwarded your letter to Messrs. H. I cannot tell you about what time they will be settled, as I have not the money myself, and, as I have told you before, I have left it entirely in their hands."—"I received your letter yesterday, and am sorry to find that you are not contented with the letter I gave you when you were at my house, some short time ago. I have heard from the Messrs. H. yesterday, and they said they had written to their agent in Dublin, to arrange the whole thing. I therefore beg that you will immediately see and inform Mr. L., who I have heard from this day, of it. It is not a bit of use writing these sort of letters, as payment will not be made any sooner for them. What I tell you is perfectly correct, and the matter will be settled shortly."—*Held*, that the letters were a ratification of the defendant's promise made during infancy.

Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification. *Harris v. Wall*, 122

INFORMATION.

See PLEADING, I, (7).

WITNESS.

INSURANCE.

Construction of Words "from thence" in Marine Policy.

Insurance on ship at and from

Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there, for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places on either side of, and at the Cape of Good Hope. The ship sailed from Liverpool direct to a port in China, having on board a cargo for that port and Manilla; from thence she proceeded to Manilla, and there discharged the remainder of her outward cargo. At Manilla, the captain took on board on freight 230 chests of opium, for Tongkoo, another port in China (not being thereby a tenth part laden), and sailed for Tongkoo, there to seek a freight for the United Kingdom, and on her voyage thither was lost by perils of the seas. Tongkoo is quite out of the direct course from Manilla to the United Kingdom:—*Held*, on error in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the words "from thence" in the policy, meant not "from Manilla" only, but "from ports or places in China and Manilla, all or any," and that the sailing from Manilla to Tongkoo for the purpose of seeking a homeward cargo was not a deviation. *Pratt v. Ashley*, 257

INTERPLEADER ACT.

See EVIDENCE, (3).

Order for Payment of Money out of Court.

Where a judge at chambers, by an interpleader order, has directed money to be paid into court to abide the event of an issue, and has reserved the question of costs, an application for payment of the money out of court must be made to the same judge, and not to the Court. *Marks v. Ridgway*.
Collins v. Ridgway, 8

INTRUSION, INFORMATION OF.

See PLEADING, I, (7).

IRREGULARITY.

See PRACTICE, (4), (5).

ISSUABLE PLEA.

See PLEADING, V.

JOINT-STOCK COMPANY.

See PLEADING, I, (10), (11).

RAILWAY COMPANY.

STAMP, (1), (2).

JUDGE'S ORDER.

See ANNUITY, (2).

MORTGAGE DEED.

PRACTICE, (4).

JUDGMENT NON OBSTANTE VEREDICTO.

See ARBITRATION, (1).

LANDLORD AND TENANT.

Liability of Lessee for Breach of Covenant to repair.

In an action for the breach of a covenant for repair in a lease, a tenant is not liable for acts done before the time of the execution of the lease, although the habendum of the lease states the premises to be held from a day prior to its execution. The habendum in a lease only marks the duration of the tenant's interest, and its operation as a grant is merely *prospective*.
Shaw v. Kay, 412

LAND-TAX REDEMPTION ACT (42 GEO. 3, c. 116).

Sale of Reversion by Lord of Manor.

The rector and lord of the manor of B. by one grant demised for three lives, at one aggregate holding, and at one undivided rent, three ancient tenements originally held of the manor under distinct grants and at distinct

rents. The same rector afterwards disposed of the reversion in fee under the provisions of the Land-tax Redemption Act, 42 Geo. 3, c. 116:—*Held*, that though the grant for lives might be void, unless sanctioned by a special custom in the manor, yet the purchaser of the reversion had a good title, the sale being approved of by the land-tax commissioners. *Doe d. Strickland v. Woodward*, 273

LEASE.

See DAMAGES, (1).

EVIDENCE, (2).

LANDLORD AND TENANT.

LEGACY DUTY.

Devise of Real Estate to Trustees with Power of Sale.

Where real estate was devised to trustees, in trust to convey the same unto and among certain persons mentioned in the will, in equal proportions, in severalty; and, for the purpose of such division and partition, the trustees were empowered from time to time to sell all or any part of the devised estates, and were to stand possessed of the money to arise from such sales, in trust for the same persons, share and share alike; and the trustees accordingly, for the purposes of the trust, sold the whole of the devised estates:—*Held*, that this was "real estate directed to be sold" within the meaning of the Stamp Act, (55 Geo. 3, c. 184, Sched., pt. 3, tit. "Legacies"), and that legacy duty was payable upon the proceeds of such sale. *The Attorney-General v. Simcox*, 749

LIBERUM TENEMENTUM.

See PLEADING, III, (6).

LIEN.

Of Vendor of Land on Title-deeds.

A vendor of land, who has con-

LIMITATIONS, STATUTE OF.

veyed the legal estate to the vendee, has no lien on the title-deeds for the unpaid purchase-money. *Goode v. Burton*, 189

LIMITATIONS, STATUTE OF.

See PLEADING, III, (8).

(1). *Part Payment.*

Part payment of a debt will not take the case out of the Statute of Limitations, unless the payment be made under circumstances which warrant a jury in inferring a promise to pay the residue; therefore, where a party, on being applied to for interest, paid a sovereign, and said he owed the money, but would not pay it:—*Held*, that it was a question for the jury to say whether he intended to refuse payment, or merely spoke in jest. *Wainman v. Kynman*, 118

(2). *Payment of Interest.*

In an action by an executor, for money lent by his testatrix to the defendant more than six years before the commencement of the suit, to which there was a plea of the Statute of Limitations, it was proved, that, within six years before the commencement of the suit, the plaintiff filed a bill against the defendant for a discovery and account, and the defendant, in his answer, admitted the payment by him to the testatrix of half-yearly payments of 8*l.* 10*s.* each, down to a period within the six years; but alleged that they were paid, not as interest upon a debt, but by way of annuity for the life of the testatrix, in pursuance of an agreement made between them at a period when the testatrix gave the defendant a sum of £340:—*Held*, that the jury were at liberty to reject the latter part of the statement, and that the answer might be construed by them merely as admitting the payment of the money, and that the appropriation of

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it, as interest upon the debt sued upon, might be proved by other evidence.
Baidon v. Walton, 617

LIQUIDATED DAMAGE.

By a deed for the dissolution of partnership between the plaintiff and defendant, it was covenanted by the defendant that he would not at any time or times thereafter, within the next seven years, directly or indirectly, either by himself or in co-partnership with another or others, carry on the business of an attorney or solicitor within the distance of fifty miles from a place named, nor interfere with, solicit, or influence the clients of the late co-partnership; and that if he should in any respect infringe that covenant, then he should immediately thereupon pay the plaintiff the sum of £1000, as and for liquidated damages, and not by way of penalty:—*Held*, that the sum of £1000 was, upon the construction of this covenant, to be considered by way of liquidated damages, and not as a penalty. *Galeworthy v. Strutt*, 659

LORD OF MANOR.

See LAND-TAX REDEMPTION ACT.

MALTSTER.

See EXCISE, (1).

MASTER IN CHANCERY.

See ANNUITY, (2).

MEMBER OF PARLIAMENT.

PRIVILEGE OF.

The privilege of a member of Parliament from arrest on a ca. sa. exists for forty days before and forty days after a meeting of Parliament. The rule of privilege is the same in the case of a dissolution as in that of a prorogation. *Goudy v. Duncombe*, 480

MORTGAGE DEED. 907

MENIAL SERVANT.

See PLEADING, I, (3).

MERGER.

See DEVISE, (6).

METROPOLIS PAVING ACT, 57 GEO. 3, c. xxix, s. 24.

See ASHES.

RATE, (1).

MONEY PAID.

Failure of Consideration.

The defendant, having some bark to sell, applied to the plaintiffs to find a purchaser. The plaintiffs applied to T., who agreed to purchase the bark if equal to sample. The bark having been shipped, the defendant sent the plaintiffs the invoice, and requested them to accept a bill of exchange for the price, which they did upon the offer of a del credere commission. The bark not being equal to sample, T. refused to accept it, and the plaintiffs having been called upon to pay the bill when due:—*Held*, that they were entitled to recover the amount of the bill, in an action for money paid to the defendant's use. *Hooper v. Treffry*, 17

MORTGAGE.

See BUILDING SOCIETY, (1).

MORTGAGE DEED.

Power of Judge to order Delivery up of.

An action of covenant on a mortgage-deed is within the 7 Geo. 2, c. 20, and under that statute a judge at chambers has power to make an order for the delivering up of the deed.

Where a statute, in general terms, and without any special limitation, either express or to be inferred from its terms, gives any power to one of

the superior courts, that power may be exercised by a judge at chambers as the delegate of the Court. *Smeeton v. Collier*, 457

NATIONAL DEFENCE ACT (5 & 6 VICT. c. 94).

Cost of Assessment by Jury of Land taken.

A person, whose land has been valued by a jury, and sold, under the provisions of the National Defence Act (5 & 6 Vict. c. 94), is not entitled to the expenses and costs which he has necessarily incurred in bringing the matter to trial. The words of the 19th section, "*compensation for the absolute purchase of the land*," are not *per se* sufficiently comprehensive to include such expenses and costs. *In re Laws, &c.*, 441

NE GRANTA PAS.

See DEVISE, (6).

NEW TRIAL.

See PRACTICE, (7).

NOTICE OF ACTION.

See TITHE COMMISSIONERS.

ORDER OF JUSTICES.

See RATE, (2).

ORDER OF REFERENCE.

See ARBITRATION, (1).

OUTLAWRY.

See PRACTICE, (10).

OVERSEERS.

Liability of, for Attorney's Bill.

An order of removal made from the parish of C. to that of L. having been confirmed by an order of justices in quarter sessions, upon a preliminary

PARTIES TO ACTION.

objection, a rule nisi was obtained for a mandamus to the justices, to enter continuances and hear the appeal. A copy of the rule was served on two of the defendants, R. D. and R. T., who then were churchwardens of C. R. T. afterwards, in conjunction with the then overseers of C., signed a retainer to the plaintiff, to act as their attorney in the matter of the mandamus, but countermanded it before anything was done by the plaintiff. R. D. did not interfere. Before the rule was argued, J. D. and W. E., the other defendants, were elected overseers, and R. D. and R. T. re-elected churchwardens. The plaintiff's clerk saw J. D. repeatedly about the rule, who asked how the matter was going on; he also repeatedly saw W. E., the other defendant, who was not so active. The plaintiff having delivered his bill of costs to one of them, they all expressed their readiness to pay, but said there was a grudge in the parish:—*Held*, that the defendants were not jointly liable. *Marsh v. Davies*, 668

PARTIES TO ACTION.

Joinder of Plaintiffs.

If A. covenant with B. & C., their executors, administrators, and assigns, although C. do not execute the deed or assent to the covenant, and afterwards disclaim it by deed, to which A. is no party, B. cannot alone (living C.) sue A. upon the covenant. *Wetherell v. Langston*, 634

Assumpsit.—The declaration stated, that plaintiff and A. B. carried on business in copartnership, and in consideration that plaintiff and A. B. would sell defendant the business, and would become trustees for him in respect of all debts, &c. due to plaintiff and A. B. in respect thereof, defendant promised plaintiff to pay him all money he had advanced in respect of the copartnership, and for

which it was accountable to plaintiff. Averment, that plaintiff and A. B. did sell the business to defendant, and that, at the time of the promise, plaintiff had advanced a certain sum. Breach, nonpayment thereof:—Held, on motion in arrest of judgment, that it was not necessary to join A. B. as a co-plaintiff, and that the declaration was good. *Jones v. Robinson*, 454

PATENT.

Specification.

The specification of a patent for "improvements in the process of finishing hosiery, and other goods manufactured from lamb's-wool," &c., stated the invention to consist in submitting hosiery, and other similar goods, to the finishing process of a *press* heated by steam, &c., in the manner hereinafter mentioned. A description was then given, by letters, of a drawing which represented a press, which consisted of a box heated by steam, up to which another box similarly heated was to be pressed by means of hydraulic pressure, or by screws, or other well-known means. After describing the method of pressing the goods between these hot boxes, the specification concluded by confining the inventor's claim to the process *as above described*:—Held, that a method of finishing hosiery goods, by passing them through heated *rollers*, was not included in this patent, and therefore was no infringement of it. *Barber v. Grace*, 339

PAYMENT.

See EVIDENCE, (1).

PAYMENT INTO COURT.

See DAMAGES, (1).

PENALTY.

See LIQUIDATED DAMAGE.

PLEADING.

See ACCORD AND SATISFACTION.
BOTTOMRY.

DEVISE, (6).

GUARANTEE, (1).

PARTIES TO ACTION.

PROMISSORY NOTE, (2).

RAILWAY COMPANY, (3).

TITHE COMMISSIONERS.

I. Declaration.

(1). *Blanks—Uncertainty.*

Declaration, containing three counts, commenced that "A. B., by h attorney, complains, &c., who h been summoned;" 2nd count, for work and materials "provided for defendant, at h request." Breach in last count, that "defendant ha not paid the same:"—Held, on special demurrer, that first and last counts were good; second, bad. *Berdoe v. Spittle*, 175

(2). *Statement of Promise not legally arising from executed Consideration—Omission of Request.*

A declaration in assumpsit stated, that, in consideration that the plaintiff had become tenant to the defendant of a farm, upon the terms that if the plaintiff should receive from the defendant notice to quit, and should have made expensive improvements upon the farm, for which the subsequent crops should not have compensated the plaintiff, the farm should, on the determination of the tenancy, be looked over by two persons, one to be appointed by each party; and that the persons so appointed should determine to what compensation the plaintiff should be entitled; and that the defendant promised the plaintiff, that if the tenancy should be determined and the plaintiff should have made improvements, for which he should not have been compensated, the defendant would, at the plaintiff's request, appoint a person for such purposes. Averment, that the te-

nancy was determined by the defendant; that the plaintiff had made improvements for which he had not been compensated; that the plaintiff, after the determination of the tenancy, appointed J. D. to determine the compensation, and J. D. was ready to act, of which the defendant had notice, and was then requested by the plaintiff to appoint some person on his behalf:—*Held*, on special demurrer, that the declaration was bad, as stating a promise which did not legally arise from an executed consideration; and also on the ground that there was no allegation that the plaintiff had requested the defendant to appoint a valuer before the commencement of the suit. *Lattimore v. Garrard*, 809

(3). *Insufficiency of Common Count for Work and Labour.*

A menial servant, entitled under the hiring to a month's warning or a month's wages, cannot recover a month's wages for having been improperly dismissed without a month's warning, upon the common indebitatus count for work and labour. *Fewings v. Tisdal*, 295

(4). *In Action on Award.*

A declaration stated that certain matters in dispute were referred to J. H. and J. M., "and to such third person as should be chosen and agreed upon by the said J. H. and J. M., and appointed by writing under their hands to be indorsed on the agreement of submission before proceeding on the said reference, to arbitrate, &c. jointly with them of and concerning the matters in difference, so as the said arbitrators, or any two of them, should make their award on or before a certain day, and that the costs of the reference and award, including a reasonable compensation to the said arbitrators for their trouble, should be in the discretion of the said arbi-

trators." The declaration then averred that J. H. and J. M., before proceeding with the reference, chose and agreed upon, and by writing under their hands nominated and appointed J. M. to be third arbitrator together with them; that the three said arbitrators made their award, and found a certain sum to be due from the defendant to the plaintiff, and further that the plaintiff and defendant should pay a moiety each of the costs of the reference and award, including the compensation to the arbitrators. Breach, nonpayment of the sum so found to be due:—*Held* bad, on general demurrer, for not shewing that a third arbitrator was properly appointed. *Bates v. Townley*, 572

(5). *In Action on Bill of Exchange.*

To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, that before the bill became due, the plaintiff indorsed the same to a person unknown, who held the same by virtue of such indorsement thence until and at the time when the same became due, and has ever since remained and still is such indorsee, to whom as such indorsee the defendant has ever since been and still is liable to pay the amount. Replication, that the plaintiff, at the time of the commencement of the suit, was the indorsee and holder of the bill, without this, that the person in the plea mentioned was, at the time of the commencement of the suit, holder of the bill in manner and form as in the plea alleged:—*Held*, on special demurrer, that the replication was good. *Arthur v. Beales*, 608

(6). *In Detinue.*

Detinue of a bill of exchange drawn by the plaintiff. Plea, that after the plaintiff drew the bill he indorsed and delivered the same to P., who from thence until the indorsee-

ment to defendant appeared to be the owner thereof, and entitled to negotiate the same: that P. afterwards indorsed and delivered the bill to the defendant for good and valuable consideration: that the defendant took the bill from P. without notice that he was not the true owner thereof; whereupon the defendant hath continually detained the same:—*Held* bad, as an argumentative denial of the plaintiff's property in the bill. *Austin v. Kelle*, 586

(7). *In Information of Intrusion.*

An information by the Attorney-General stated that the Queen was and still is seised in her demesne as of fee, in right of her crown, of and in Waltham Forest, and that she and all her ancestors, kings and queens of England, have continually held and enjoyed the said forest, and the game of wild beasts and fowls of chase and warren coming and arising of and from the said forest, and all rights, profits, and privileges, liberties, and franchises appertaining thereto, without any disturbance, title, or claim made or pretended thereto, &c.; that the defendant, on divers days, unlawfully erected a high fence, and dug a deep ditch in and upon the soil of the said forest, to wit, upon and around 100 acres of land, being parcel of and within the said forest, and therewith inclosed the said 100 acres of the said forest, and encroached and usurped thereon, and separated the same from the residue of the said forest, and kept and continued the said fence, &c., whereby the Queen could not have and enjoy the said forest and the said game, and the said rights, profits, &c., in as full and ample a manner as she of right ought to have and enjoy the same, to the great injury and disturbance of the Queen in the said forest, to the great damage and destruction of the vert and venison of and in the said forest, to the disinherison of the

Queen in the premises. Plea, that the said place in which &c. was not, nor was any part thereof, parcel of, or within the supposed forest, modo et formâ:—*Held*, on demurrer, that the plea was good, since this was not an information of intrusion into *lands* of the Crown, but an information, in the nature of an action of trespass on the case, for the injury to the incorporeal right of forest, by interfering with the game. *Attorney-General v. Hallett*, 211

(8). *In Action against Sheriff.*

A declaration in an action against W. and S. stated, that the plaintiff was employed by the contractors of certain proposed buildings to cart and convey away the earth dug out of the excavations and sites of the proposed buildings with the horses and cart of the plaintiff; that an action was depending in the Court of Queen's Bench wherein S., one of the defendants, was plaintiff, and T. defendant, in which action the defendant allowed judgment to go by default, and a writ of *fi. fa.* thereupon issued against the goods of the defendant in that action directed to W., the other defendant, then being sheriff of York, to be put in execution by him as such sheriff; yet the last-mentioned defendant, as such sheriff, contriving to injure the plaintiff *by and with the aid, counsel and assistance of S., the other defendant*, by him wrongfully and maliciously given, seized, took, and carried away, in execution of the said writ, divers goods and chattels of the plaintiff, to wit, two horses and one cart, under pretence that the same belonged to T., and afterwards sold the goods and chattels as an execution under the writ against the goods of T. By means of the premises and for want of the use of the horses and cart, the plaintiff was unable to carry on his employment and business, and thereby lost great gains, &c.:—*Held*,

on demurrer, that the declaration shewed no cause of action against S. *Sedman v. Walker*, 589

(9). *In Action against Railway Company.*

To a declaration on an indenture made between the plaintiff and defendants, provisional directors of a projected railway company, called the Direct Northern, after reciting that plaintiff was owner of certain lands through which that railway, and another called the Great Northern, were intended to pass, and that the plaintiff would support the former and oppose the latter line, it was covenanted that, if the Direct Northern's bill should pass, before six months from the date of the deed, the company should pay the plaintiff certain large sums of money in certain specified cases for the injury done to, and for the purchase of his land; that, if the Great Northern's bill should pass within eighteen months from the same date, that the Direct Northern was to pay the plaintiff, within three months after that event, certain sums of money in certain specified cases for compensation, &c., *provided*, that, if no act authorising the Direct Northern to make their line should be passed within six months from the date of the indenture, either party might put an end to the agreement by giving notice in writing, and that, after the giving of such notice, the agreement and everything contained in it should be absolutely null and void, except the proviso and a covenant as to certain costs to be paid to the plaintiff; and, *lastly*, that if the companies should be amalgamated, that then, three months after such event, the amalgamated companies should pay certain sums of money in certain events, one of these being the sum of £6000 if the line followed the course of the *Direct* line, without a branch to Stamford, and that in such case all the covenants appli-

cable were to be performed by the amalgamated companies. The declaration, after alleging that the companies were amalgamated, that the line took the course of the Direct Northern, without a branch to Stamford, and that the period of three months had elapsed, concluded with laying as a breach the nonpayment of the £6000. The defendants pleaded, that no act of Parliament authorising the Direct Northern to make their intended line was passed within six calendar months, and that the defendants gave the plaintiff notice that they were desirous to put an end to the agreement, and that no part of the line had passed through plaintiff's estate, or that it had been injured under the act:—*Held*, on general demurrer, that the plea was a good answer to the action. *Lindsey (Earl of) v. Cooper*, 579

(10). *In Action by Joint-stock Company.*

1. A declaration stated that the plaintiffs agreed with other persons to endeavour to form a joint-stock company for making a railway; that a deposit of 2*l.* 2*s.* per share was to be paid by the allottees; that the plaintiffs formed the committee of management, and allotted to the defendant twenty-five shares, upon the terms that a deposit of 2*l.* 2*s.* per share should be paid by him on or before the 9th December, 1845, to the account of the company, to one of certain bankers, of all which premises the defendant, on &c., had notice. The declaration then averred mutual promises, and alleged that although the plaintiffs were always ready and willing to fulfil all things on their parts, and although the 9th day of December had elapsed, yet the defendant had not paid the deposit of 2*l.* 2*s.* per share.

The defendant pleaded, fourthly, that the plaintiffs were not always

ready and willing to perform the terms in the declaration mentioned. Fifthly, that the defendant had not notice of the said several premises in the declaration mentioned. Sixthly, that before the commencement of the suit, the plaintiffs and the company agreed, without the consent of the defendant, that the endeavours to establish the company should be and the same were abandoned, and the shares allotted to the defendant became utterly worthless.

Held, on special demurrer, that the pleas were bad, and the declaration good. *Duke v. Dive*, 36

2. A declaration stated, that before the making of the promise of the defendant, to wit, on the 20th of August, 1845, the plaintiffs had agreed together with divers, to wit, 200 other persons, to endeavour to form and establish a joint-stock company for making a railway, and to obtain an act of Parliament for that purpose; the capital to be divided into shares of £20 each, and a deposit of 2*l.* 2*s.* per share to be paid by such persons as should apply for and to whom the shares should be allotted by a committee of management: that the defendant applied to the plaintiffs, then being the committee of management, and requested them to allot him fifty shares, and then undertook to accept the same or a less number; and thereupon, to wit, on the 25th of November, 1845, the plaintiffs at the request of the defendant allotted him thirty-five shares in the said company, upon certain terms then agreed upon between them, that is to say, that a deposit of 2*l.* 2*s.* on each share so allotted should be paid on or before the 9th of December, 1845, to the account of the company, to certain bankers then agreed upon; and thereupon, in consideration of the premises and that the plaintiffs at the request of the defendant had promised the defendant to perform the said terms on their

part, the defendant promised the plaintiffs to perform the said terms on his part. Averment of plaintiffs' readiness and willingness to perform the terms; and breach, the nonpayment by the defendant of the deposit.

Held, that the declaration was good on general demurrer, although it did not allege that the company was provisionally registered under the 7 & 8 Vict. c. 110, or that it was formed before that act came into operation; for illegality will not be presumed: if it in fact exists, it should be made the subject of a plea. Also, that the declaration disclosed a contract upon which the plaintiffs alone might sue, without joining the other members of the company.

Held, also, on special demurrer, that the declaration was not bad for not alleging that the company was continuing when the shares were allotted to the defendant; nor for not shewing with sufficient certainty that the defendant accepted the shares allotted; nor for not stating what the terms were which the plaintiffs undertook to fulfil. *Duke v. Forbes*, 356

(11). *In Actions against Joint-stock Company.*

On Promissory Note.

In an action against a joint-stock company upon a promissory note, the declaration stated, that the company was completely registered; that one S. P. and one C. L., then being two of the directors of the company, made their promissory note, and thereby promised, on behalf of the company, to pay to the plaintiff, or his order, 32*l.* 4*s.* 9*d.*, the balance of the plaintiff's account due from the company; which note was then signed by S. P. and C. L., and was then made by them, and in their names, and on behalf of the company, and then was and is expressed by them to be made on behalf of the company, and was

then countersigned by the secretary of the company; and thereupon the company, in consideration of the premises, then promised the plaintiff to pay him the amount of the note according to the tenor and effect thereof:—*Held* bad, on general demurrer. *Thompson v. Universal Salvage Company*, 694

(12). *In Trover*.

To an action of trover for goods, the defendant pleaded, that the goods in question were deposited with the defendant as a security for a certain debt due to the defendant from the plaintiff, on the terms that the defendant should retain them till the debt should be paid; that the debt had not been paid; and therefore, that the defendant had refused to deliver them up, as he lawfully might. Verification:—*Held*, on special demurrer, that the plea was bad, as amounting to an argumentative denial of the plaintiff's right of possession at the time of the alleged conversion. *Dorington v. Carter*, 566

(13). *In Scire Facias*.

Semble, that a declaration in scire facias on a judgment recovered against the public officer of a banking co-partnership, alleging that the defendant, at the time of judgment recovered, was and from thence hitherto had been and still is a member of the co-partnership, is bad on special demurrer. *Esdaile v. Trustwell*, 371

II. *Pleas in Abatement*.

(1). *Affidavit of Verification*.

The 4 Anne, c. 16, s. 11, requiring pleas in abatement to be verified by affidavit, is an enactment for the sole benefit of plaintiffs, and may be waived by them.

Therefore, where a defendant delivered a plea in abatement, with a de-

fective affidavit of verification, and the plaintiff traversed the plea, and made up the issue, and the defendant struck out the similiter and demurred, and the plaintiff, after an unsuccessful application to set aside the demurrer as frivolous, obtained two several summonses for time to join in demurrer, and before the time expired signed judgment as for want of a plea:—*Held*, that the judgment was irregular. *Graham v. Ingleby*, 651

(2). *Materiality of Dates*.

A declaration against two executors on a bill of exchange accepted by their testator, stated, in the commencement, that the defendants had been summoned by virtue of a writ issued on the 14th May, 1847. The defendants pleaded in abatement, that the testator heretofore, to wit, on the 13th December, 1846, made his will, and thereby appointed the defendants and B. executors and executrix thereof; and afterwards, to wit, on the 16th December, 1846, died; and the defendants and B. afterwards, to wit, on the 23rd January, 1847, duly proved the will, and took upon themselves the burthen of the execution thereof; and B. then administered divers goods and chattels which were of the testator at the time of his death, as executrix of his will. The plea being specially demurred to, on the ground that it did not shew that B. administered *before the commencement of the suit*,—*Held*, that the plea was good, for dates may be assumed to be material on demurrer, when, if truly stated, they would support the plea; and therefore the Court must intend that the administering of the assets was before the commencement of the suit, the date of the writ being stated; and it seems the Court is presumed to have the writ before them on demurrer.

Held, also, that the plea was not

double, as the allegation of probate was only inducement to the averment of administration.

Though the 27 Eliz. c. 5, and 4 Anne, c. 16, do not apply to pleas in abatement, yet, at common law, duplicity in such pleas could only be taken advantage of on special demurrer. *Ryalls v. Bramall*, 734

III. Pleas in Bar.

(1). *When bad as amounting to General Issue.*

To an action of assumpsit for the use and occupation of furnished apartments, the defendant pleaded, that before he occupied the apartments by the permission of the plaintiff, he held them as tenant under a demise from one A. B., whose property they were; that while he so held them, A. B. assigned them to the plaintiff; that the defendant became indebted in respect of the apartments, and that he paid A. B. a certain sum of money for them, by whom it was accepted in satisfaction of the debt. Averment, that the defendant never had notice of the assignment to the plaintiff, that he never agreed to become the plaintiff's tenant, that he never expressly requested the plaintiff to permit him to occupy the apartments, and that he never expressly promised the plaintiff to pay him for them:—*Held*, that the plea amounted to the general issue. *Cook v. Moylan*, 67

(2). *Argumentative Denial of Acceptance of Bill.*

E., one of several persons sued as acceptors of a bill of exchange, pleaded that, at the time of the acceptance, the defendants were partners upon the terms (amongst others), that neither of the partners should, without the consent of the others, draw, indorse, accept, or negotiate any bill of exchange in the name of the firm otherwise than for bonâ fide debts or lia-

bilities of the firm; that the bill was accepted by the other defendants in the name of the firm without the knowledge or consent of defendant E., and in fraud of him, and in violation of the terms of the partnership, and was delivered by the other defendants to the plaintiff for and on account of money due and owing to the plaintiff from the defendant J., and not for any debt or liability of the firm; of all which the plaintiff had notice at the time of the delivery of the bill to him; that there never was any value or consideration, except as aforesaid, for the acceptance of the bill, or for the payment thereof, by the defendant E.; and that the plaintiff has always held the same without value or consideration. Verification:—*Held*, on special demurrer, that the plea was an argumentative denial of the acceptance, and therefore bad. *Grout v. Enthoven*, 382

(3). *Argumentative Denial of Allegation of Readiness and Willingness.*

To a declaration in assumpsit, which stated that plaintiff agreed with defendants to act as their salesman for one year, and not to be connected with any other house in disposing of their goods; and that defendants agreed to pay plaintiff £200 for such servitude. Averment, that plaintiff entered into defendants' employ, and continued therein, and was not connected with any other house, and had always, until the expiration of one year from the said agreement, been ready and willing, and offered to remain in such employ, and not to be connected with any other house. Breach, that defendants would not suffer plaintiff to act as salesman for the remainder of the year, but discharged plaintiff and had not paid the £200. The defendants pleaded as to the nonpayment of the £200, that after plaintiff ceased to be in defendants' employ, and during the year, plaintiff entered

into the service of the house of certain other persons, and became connected with it in disposing of their goods. Verification:—*Held* bad, on special demurrer, as an argumentative denial of the plaintiff's readiness and willingness to remain in defendants' employ. *Spotswood v. Barrow*, 804

(4). *Non-Joinder of Co-Assignee.*

In actions of contract by the assignees of a bankrupt or insolvent, the proper mode of taking advantage of the non-joinder of another assignee is by a traverse that the plaintiffs are assignees *modo et formâ*, and not by plea in abatement. *Jones v. Smith*, 831

(5). *Accord and Satisfaction.*

1. In an action of debt upon two indentures whereby the defendant's testator covenanted to pay the plaintiff the respective sums of £1300 and £700, with interest, the defendant pleaded, in substance, that the plaintiff was a mortgagee, by two mortgages, of an estate which was insufficient, upon an estimate of its value, to pay the mortgage money due from the testator; that three other mortgagees were in the same situation, the estate realised to each being less in estimated value than the charge upon it; that the defendants were devisees of the real estate, and executors of the deceased mortgagor; that they had received assets, which, after deducting the costs and expenses payable by them in the first instance, and in preference to the debts due from the testator, and also excepting some furniture, amounted to the deficiency on each mortgage; and thereupon it was agreed between the plaintiff and the defendant, and each of the mortgagees, as the common consent of all, and at the request of each, that no suit should be instituted for the administration of assets, and that the said balance of the assets, after deducting the furniture, which should

be given to the widow, should be divided rateably between the different mortgagees, and paid to them in satisfaction of the sums due to them over and above the estimated value of the estates; and that all the respective *rights and equities of redemption*, or other rights of the defendants, as executors and trustees to the mortgaged property, *should thenceforth be wholly barred, extinguished, satisfied, and discharged, and the mortgagees should thenceforth become absolute owners, both at law and in equity, of the mortgaged estates*, and that the covenants in the declaration should be satisfied and discharged in consideration of the premises. The plea then averred payment to each of his share of the assets, and that *the several rights and equities of redemption were barred and extinguished*. Replication, that it was not agreed, nor did the defendants pay to the plaintiff the sum of money in the plea mentioned, upon which issue was joined. The judge at the trial having ruled that the plea could not be proved, except by an agreement in writing, on motion for a new trial, and assuming, for the disposal of that question, that the plea, if proved, would be a good bar:—*Held*, that though an agreement to convey an equity of redemption is not binding unless in writing, yet this plea would have been held good on demurrer, even if it had expressly stated that the contract was by parol; for the agreement by the plaintiff to forego the balance of his mortgage above the value of the estate, on receiving his share of the assets, was obligatory on him, and the receipt of that share a satisfaction for the estate, though there was no binding agreement on the defendants to convey the equity of redemption, for the agreement of the other mortgagees to take their shares also was a good consideration for giving up the claim for the residue

of the debt against the defendants. Whether the plea, if proved, would be a good bar, *quære?* *Massey v. Johnson*, 241

2. To an action by indorsee against maker of a promissory note, the defendant pleaded, that the note was made by himself and one A. B., his partner, and that, whilst the plaintiff held the note, the defendant and A. B. delivered to the plaintiff nineteen signed bills of costs, &c., which were referred to taxation; that it was agreed that the balance found to be due from the plaintiff to the defendant and A. B. should be applied in part payment of the note, and that the balance of the note, with interest, should be secured by a judgment, payable at certain periods, which had elapsed before the commencement of the suit; that the taxation had not been completed, and that the balance was not ascertained; that the defendant and A. B. had always been ready and willing to apply the balance due to the defendant towards the payment of the note, and to secure the balance due on the note by a judgment, in accordance with the agreement:—*Held*, that the plea was bad on general demurrer. *Carter v. Wormald*, 81

(6). *Liberum Tenementum*.

Held, on error in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that *liberum tenementum* is a good plea to a declaration in trespass for breaking and entering a dwelling-house in the occupation of the plaintiff, and expelling him and his family therefrom, although the premises are particularly described in the declaration. *Harvey v. Bridges*, 261

(7). *Set-off*.

Debt for money had and received, money lent, and on an account stated, to the amount of 19*l.* 10*s.* Plea of set-off of 50*l.* The particulars of de-

mand claimed 6*l.* 10*s.* for money lent; at the trial the defendant merely proved a set-off of 6*l.* 10*s.*:—*Held*, that he was not entitled to the verdict. *Roche v. Champain*, 10

(8). *Statute of Limitations*.

To a declaration in covenant, which commenced by stating that the defendant was summoned to answer the plaintiff and R., since deceased, by virtue of a writ issued on the 21st March, 1843, the defendant pleaded, in bar of the further maintenance of the action, special pleas of the Statute of Limitations, alleging that the first writ with which the defendant was served was a writ of pluries summons, dated 21st October, 1846, and that such writ was not issued within one calendar month next after the expiration of any preceding writ of summons, and that the cause of action did not accrue within twenty years next before the date and issuing of the said pluries writ of summons:—*Held* bad on special demurrer; first, as an argumentative denial that the cause of action accrued more than twenty years before the commencement of the suit; secondly, as not being properly pleaded in bar of the *further maintenance* of the action.

Notwithstanding the 10th section of the Uniformity of Process Act, 2 Will. 4, c. 39, requires a particular mode of issuing and continuing writs, in order to prevent the operation of any Statute of Limitations, a plea of such statute must, in all actions, be in the general form, that the cause of action did not accrue within — years next before the commencement of the suit; and if the plaintiff replies that the cause of action did accrue within the limited time, he must shew by a proper record that all the formalities required by the 10th section have been complied with. *Higgs v. Mortimer*, 711

(9). *Statute of Usury—Duplicity.*

Covenant for payment of £250 and interest on demand. The defendant pleaded, that the covenant was entered into in pursuance of an usurious contract, by which the defendant agreed to pay more than £5 per cent. by way of interest, and that the payment was secured by a deed, whereby the defendant bargained and sold to the plaintiff, by way of security, certain personal chattels, and also "*the crops of grass then growing on certain lands.*"

Replication, that the contract was entered into after the passing of the 2 & 3 Vict. c. 37:—*Held*, on general demurrer, that the plea was good, and the replication bad; for though the term "crops of growing grass" might mean crops to be severed by the owner of the soil, and delivered as a personal chattel, yet the plea afforded a good *prima facie* answer to the action, it being sufficient for the defendant to shew that the contract was usurious within the 12 Anne, s. 2, c. 16; and if the plaintiff relied upon the 2 & 3 Vict. c. 37, as excepting the case from the operation of that act, he should reply, that the contract was entered into after the passing of the statute of Victoria, and that the security did not relate to land.

The defendant pleaded also a general plea of fraud, to which the plaintiff replied *de injuriâ*:—*Held*, a good replication.

Another plea set out a power of sale in default of payment of £250, and interest, and averred that, in pursuance thereof, the plaintiff sold and disposed of the goods, chattels, and effects, in the indenture mentioned, for the purpose of repaying, satisfying, and discharging the £250, interest, and costs; and the plaintiff, by means of such sale and disposal, had and received £500, being the proceeds and profits of the sale and disposal, and thereby and therewith repaid, satisfied,

and discharged, the sum of £250, interest, and costs. And the plaintiff, with the consent of the defendant, received the said proceeds and profits of the sale and disposal, in full satisfaction of the said sum of £250, interest, and damages.

Replication, that the plaintiff did not sell or dispose of the said several goods, chattels, and effects, nor did the plaintiff, by means of such sale and disposal, have or receive the said monies, being the proceeds and profits of the said sale and disposal, nor did the plaintiff thereby or therewith repay, satisfy, or discharge the sum of £250, interest, &c., nor did the plaintiff accept or receive the said proceeds and profits of the sale and disposal in full satisfaction and discharge, *modo et formâ*:—*Held*, on special demurrer, that the replication was not bad for duplicity. *Washbourn v. Burrows*,

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IV. *Replication.*(1). *To Plea of Heriot Custom.*

Trespass for breaking and entering the plaintiffs' close, and seizing and taking certain goods and chattels, to wit, two horses. The defendants pleaded, as to breaking and entering the said close, and seizing and taking parcel of the said goods and chattels, to wit, one of the said horses, a justification of the seizure of that horse as a heriot due in respect of a customary tenement whereof the plaintiffs' testator died seised. The defendants also pleaded, as to the breaking and entering the said close and seizing and taking parcel of the said goods and chattels, to wit, the said other horse, a justification of the seizure of that horse as a heriot due in respect of another customary tenement whereof the plaintiffs' testator died seised. The plaintiffs replied separately to each of the pleas, that the defendants, at the same time, place, and occasion, when they took the horse in the in-

troductory part of that plea mentioned, also seized and took the said other horse (being the residue of the said goods and chattels), under colour and pretence of the said heriot custom, and under an assertion and claim of right to seize and take the same other horse as and for the said heriot custom:—*Held*, on special demurrer, that the replications were good, inasmuch as the seizure of the other horse rendered the defendants trespassers ab initio as to the entry, as well as the seizure of the chattels. *Price v. Woodhouse*, 559

(2). *De Injuriâ*.

1. The replication *de injuriâ* is good to a plea which sets up a defence under the Tipling Act, 24 Geo. 2, c. 40, s. 12. *Lansdale v. Clarke*, 78

2. A plea which admits a contract in fact, either express or implied, and seeks to avoid it on the ground of illegality or fraud, is a plea in excuse, and may be traversed by the replication *de injuriâ*.

Therefore, where to an action for work and labour, the defendant pleaded that the work was done by the plaintiff as a broker within the city of London, and that the plaintiff was not licensed to act as a broker:—*Held*, that *de injuriâ* was a good replication. *Bennett v. Bull*, 593

V. *Issuable Plea*.

1. To an action on a bill of exchange for £20, drawn by J. L., and indorsed to the plaintiffs, and accepted by the defendant, the defendant pleaded, that, before and at the time of the indorsement, J. L. was indebted in 1*l.* 13*s.* 1*d.* to the defendant, and that J. L. held the bill on the terms that the sum so due should be set off against the amount of the bill; and that J. L., in fraud of the defendant, and in collusion with the plaintiffs, indorsed the bill to them, who sued as agents merely of J. L.:—*Held*, that the plea

was not issuable. *Mayhew v. Blofield*, 469

2. To a declaration containing a count by indorsee against indorser of a bill of exchange, and a count on an account stated, the defendant, who was under terms of pleading issuably, pleaded thus:—"And the defendant, by &c., says, that he did not indorse the said bill in manner and form as in the first count mentioned; and as to the last count, that he did not promise." The plaintiff having signed judgment, on the ground that the first plea in terms applied to the whole declaration, and was therefore non-issuable, the Court set aside the judgment for irregularity. *Bousfield v. Edge*, 89

VI. *Materiality of Issue*.

To an action by indorsees of a bill of exchange against the drawer, the defendant pleaded, that the bill was indorsed by T. K. to plaintiffs, who, upon its becoming due, paid the amount thereof to plaintiffs, who received it in full satisfaction and discharge of the sum in the bill specified, and then delivered the bill to T. K., who had been ever since and was the holder at the commencement of the suit, and that, by virtue of the premises, defendant was liable to T. K. Replication, that plaintiffs were the holders of the bill at the commencement of the suit, without this, that T. K. was the holder, *modo et formâ*:—*Held*, on motion for a repleader, that the issue raised by the replication was material. *Rogers v. Chilton*, 862

VII. *Several Counts*.

A declaration contained a count for money paid, together with a count which, in substance, stated, that, in consideration that the plaintiff, at the defendant's request, had contracted to sell to a third party, in the plaintiff's name, and on his credit and responsi-

bility, certain shares in a railway company, of which the defendant was the registered holder, the defendant promised the plaintiff to deliver to him all new shares allotted in respect of such shares, and to indemnify him from all loss which might arise by reason of the non-performance of the defendant's promise. It then alleged the non-delivery to the plaintiff of certain new shares allotted to the defendant; and that, by reason thereof, the plaintiff was forced and obliged to expend and did expend a large sum of money, in order to perform his said contract of sale:—*Held*, that the two counts were not in violation of the rule of H. T., 4 Will. 4, r. 5, which prohibits several counts, unless a distinct subject-matter of complaint is intended to be established in respect of each. *Simpson v. Rand*, 688

VIII. Pleading several Matters.

In the general form of declaration given by the Companies Clauses Consolidation Act, (8 & 9 Vict. c. 16, s. 26), in actions for calls on shares, the allegation, "that defendant is the holder of shares," means that he was the holder at the time the call was made. Therefore, where a declaration in an action for calls stated, that the defendant, at the time of the commencement of the suit, was and still is the holder of shares, and, at the time of the commencement of the suit, was and still is indebted to the plaintiffs for calls on those shares, &c., whereby and by force of the 8 & 9 Vict. c. 16, and the special act, an action accrued &c., and the defendant pleaded, that, at the time of the commencement of the suit, he was not the holder of the said shares, and also that he was not the holder of the shares at the time the calls were made, the Court, on motion, struck out the latter plea, and amended the declaration and former plea by striking out the words "at the commencement of the suit." *The Bel-*

fast and County Down Railway Company v. Strange, 739

¶ PRACTICE.

See TRIAL AT BAR.

(1). *Distringas*.

For a *distringas* to compel an appearance, it is sufficient if it appear that the calls were made at the defendant's place of business, if his residence is unknown. *Baker v. Coe*, 153

(2). *Inspection of Documents*.

Where an action was brought by an allottee in a railway company, for the recovery of his deposit, against a member of the managing committee, and it appeared by affidavit that the subscribers' agreement and parliamentary contract had been signed by the plaintiff and defendant, and was in the hands of the solicitor to the company and to the defendant; and that an inspection and copy of those documents was necessary for the purpose of proving the plaintiff's case:—*Held*, that the plaintiff had a right to such inspection and copy. *Ley v. Barlow*, 800

(3). *Appeal against Order of Judge to hold to Bail*.

It is allowable, under 1 & 2 Vict. c. 110, ss. 3 and 6, where the defendant appeals to the Court against an order to hold to bail, to use affidavits in denial of the plaintiff's cause of action. But the Court will not interfere unless it plainly appear that the plaintiff has no cause of action against the defendant. *Pegler v. Hislop*, 437

(4). *Time of Application to set aside Judge's Order*.

An order having been made on the 6th of July, 1846, by a judge at chambers, to set aside a *verdict* obtained under a writ of trial, on the ground of the insufficiency of the notice of

trial:—*Held*, that the order was merely irregular, and not a nullity; and, therefore, that an application on the last day of Trinity Term, 1847, to rescind it was too late. *Orgill v. Bell*, 466

(5). *Rule to plead several Matters.*

To a declaration which contained three counts, the defendant, who appeared by attorney, upon a rule in general terms to plead coverture and the Statute of Limitations, pleaded these defences to the whole declaration. The pleas were set aside by a judge at chambers, on the ground that the defendant, who appeared by attorney, had pleaded coverture. The defendant, without a fresh rule to plead, and without entering a fresh appearance, pleaded coverture to the two first counts, and the Statute of Limitations to the whole declaration. The plaintiff having signed judgment as for want of a plea—*Held*, that the judgment was irregular, inasmuch as the pleas were sanctioned by the original rule. *Fryer v. Andrews*, 471

(6). *Election by Plaintiff of one of several Actions against Co-contractors—Costs.*

The plaintiff having brought twenty-eight separate actions against as many railway directors, in January, 1846, in the following month delivered twenty-eight separate declarations, to which the defendants pleaded separately in abatement, the pendency of another action; in one action a defendant withdrew his plea and pleaded in bar, and upon that plea issue was joined, and the cause was referred to arbitration, at the sittings after the following Trinity Term, all the parties agreeing to be bound by the award, and the plaintiff subsequently had an award in his favour. In Trinity Term, the plaintiff had judgment on demurrer to the plea in abatement,

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in one action, whereupon the plaintiff demanded joinders in demurrer in the twenty-six others, but offered to consolidate. The defendants having obtained a rule in Trinity Term, calling on the plaintiff to elect upon which to proceed, and to be relieved from costs incurred since the time of pleading in abatement, and in the mean time to stay proceedings, the Court held, that the rule ought to be discharged, but suggested that it should be disposed of by consent, as if it had been obtained *after* the award was made, in which case the plaintiff would be entitled to his debt and costs in pursuance of the award, and of costs incurred since the time of pleading in abatement, with costs of all the writs, and that all proceedings would be stayed, except in the cause referred. *Henry v. Nash*, 826

(7). *As to granting New Trial.*

In an action by an allottee in a projected railway, upon the failure of the scheme, for the recovery of his deposit, where he had executed the usual subscribers' deed, there being no evidence that such execution was obtained by fraud, the defendant, under the direction of the judge, obtained a verdict:—*Held*, that, as the plaintiff should have been nonsuited, a rule for a new trial ought not to be granted, although some observations made by the learned judge to the jury, as to what would constitute fraud, might not be legally correct; but in such a case the Court will grant a rule to enter a nonsuit. *Atkinson v. Pocock*, 796

(8). *Entering Judgment on Cognovit.*

A plaintiff may enter up judgment on a cognovit given before appearance, and upon which no step has been taken for more than a year, without first giving a term's notice, or obtaining leave of the Court or a judge. *Thompson v. Langridge*, 351

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EXCH.

(9). *On Rule Absolute for Judgment on Scire Facias, at the suit of Executors.*

An affidavit in support of a rule absolute for judgment on a scire facias, at the suit of executors, must shew that probate has been granted to them. *Vogel v. Thompson*, 60

(10). *Appearance to revert Outlawry for Error in fact.*

A party may appear by attorney to reverse an outlawry for error in fact.

The rule in this respect is the same in the Exchequer as it is in the other courts. *Craig v. Levy*, 570

PRIVILEGE.

See MEMBER OF PARLIAMENT.

PROHIBITION.

See SMALL DEBTS ACT, (2).

PROMISSORY NOTE.

See PLEADING, (11).

(1). *Agreement for Renewal of.*

H. having advanced large sums of money to the defendant, on account of certain estates in the West Indies, of which they were joint owners, received from the defendant two promissory notes, to the amount of £3000, upon an agreement which contained the following terms:—"Should the crops (of the estates) not come forward in time to provide for these notes, I shall expect to have them renewed for such period as may be found necessary from the condition of the properties." The crops proved unproductive, and the notes were renewed three times: the present action was brought on the third renewed note, which had been indorsed to the plaintiffs with a knowledge of the agreement:—*Held*, that the agreement stipulated for one renewal only, and

that the plaintiffs were entitled to recover. *Innes v. Munro*, 473

(2). *Payable at a particular Place.*

A declaration stated, that the defendant made his promissory note, and thereby promised to pay to the plaintiff, "by the name and addition of Miss Jessie Hope, at 10, Duncan-street, Edinburgh," the sum of £200, &c. Averment, that the plaintiff was always ready and willing to receive the said sum, according to the tenor and effect of the note, of which the defendant had notice. Breach, non-payment:—*Held*, on general demurrer, that this was a note payable at a particular place, and that the declaration was bad for want of an averment of presentment at that place. *Spindler v. Grellett*, 384

(3). *Indorsement.*

H. indorsed a promissory note, but did not deliver it. After the death of H., his executor delivered the note to the plaintiff:—*Held*, that the plaintiff had no title to sue on the note. *Bromage v. Lloyd*, 32

RAILWAY COMPANY.

See ATTORNEY, (2).

PLEADING, I, (9).

PRACTICE, (2), (6), (7).

STAMP, (1), (2).

(1). *Action by Allottee of Shares to recover back Deposit.*

1. An allottee of shares in a railway company provisionally registered, paid a deposit of 2*l.* 12*s.* 6*d.* per share, and signed the subscribers' agreement, which gave the provisional directors power to carry on the undertaking or any part of it, or to abandon the whole or any part of it; and out of the monies which should come to their hands by way of deposit or otherwise, to make such deposits or investments as might be required by the standing orders of

Parliament, and also to pay salaries, &c., and also the costs of obtaining acts of Parliament, &c., and generally to apply such monies in paying and satisfying all other costs, expenses, or liabilities which they might incur in relation to the undertaking. The scheme proved abortive, and the company was dissolved under the provisions of the 9 & 10 Vict. c. 28. In an action to recover back the deposit—*Held*, that the plaintiff, by executing the deeds, had authorised the directors to dispose of the money, and therefore could not recover back any part of the deposit. *Garwood v. Ede*, 264

2. The plaintiff signed an application for shares in a railway company provisionally registered. The application contained the usual undertaking to sign the subscribers' agreement and parliamentary contract when required. The plaintiff had no letter of allotment, but having paid the deposit, received scrip certificates in the usual form, stating, that "the subscribers' agreement and parliamentary contract had been signed by the person to whom the certificate was issued." The plaintiff, in fact, never signed either the subscribers' agreement or parliamentary contract. The scheme having proved abortive; in an action to recover back the deposit—*Held*, that the plaintiff had placed himself in the same situation as if he had signed the subscribers' agreement and parliamentary contract, and could not recover. *Clements v. Todd*, 268

3. Where an allottee of shares in a joint-stock company, which is afterwards abandoned, seeks to recover back the deposit paid, as upon a failure of consideration, he must give in evidence the letter of allotment. *Clarke v. Chaplin*, 26

4. In an action by an allottee of a railway company for the recovery of his deposit, it appeared that the company issued a prospectus, which stated

the capital to consist of 60,000 shares of £25 each, and the plaintiff, after having paid his deposit, executed the subscribers' agreement, which contained the usual terms as to the disposition of the deposits: at the time when he executed the deed, the deposits upon 18,160 shares only had been paid, although 35,000 shares had been allotted, which fact was not communicated to him:—*Held*, that the withholding of the above fact did not amount to such a fraud as to avoid the deed, and that the plaintiff was not entitled to recover back his deposit. *Vane v. Cobbold*, 798

(2). *Liability of, to make Compensation before entering on Close to make Tunnel.*

Trespass for breaking and entering the plaintiff's close, and making a tunnel through the same. Plea, that the close was a public highway, and that the defendants, by an act of Parliament, were incorporated for the purpose of making and maintaining a railway; that, before the passing of the said act, certain plans and sections of the railway, shewing the lines and levels thereof, and also books of reference containing the names of the owners of the land through which the same was intended to pass, had been deposited with clerks of the peace; that by the said act it was enacted, that, subject to the provisions of that act and the Companies Clauses Consolidation Act and Railway Clauses Consolidation Act, it should be lawful for the defendants to make and maintain the railway in the line and upon the lands delineated and described on the said plans and in the books of reference, and to enter upon, take, and use such of the said lands as should be required for that purpose; that the said close in which &c. was delineated and described on the said plans and in the books of reference, and was and is such public highway as aforesaid,

whereupon the defendants at the said time, when &c., under and by virtue of the said acts, entered upon the said close in which &c., under the surface thereof, in order to make and did then so make, under the said highway, a tunnel, doing as little damage as could be, and in so doing dug, excavated, and bored the close of the plaintiff, and made the tunnel in the declaration mentioned, as they lawfully might for the cause aforesaid. Replication, that the close was required to be purchased and permanently used for making and permanently maintaining the railway; that the plaintiff being the owner of the close for a term of years, subject to the user of the same as a public highway, did not at any time consent that the defendants might enter upon or take the close, nor did the defendants give any notice to the plaintiff to sell and convey or release the same to them, or that they required the same; nor did the defendants pay the plaintiff, or deposit in the Bank, any purchase-money or compensation for the interest of the plaintiff therein; that the defendants did not enter on the close for the purpose of merely surveying or taking levels, &c., but for the permanent using and taking the same to their own use; and at the said time, when &c., and thence hitherto, have used and now permanently use the close of the plaintiff for the permanent purpose of the railway. On demurrer to the replication—*Held*, that the plea afforded no justification, inasmuch as the defendants were bound, under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, to make compensation before entering upon the close. *Ramsden v. The Manchester, South Junction, and Altrincham Railway Company*, 723

(3). *Prohibited Act—Special Damage.*

A declaration stated, that, before

and at the time of the passing of the 1 Vict. c. cvii, the plaintiff was, and has ever since been, the owner of a ferry across the Mersey, from Tranmere, in the county of Chester, to Liverpool, and that by the said act the defendants were empowered to make a railway, with all necessary stations and works connected therewith, commencing at Brook-street, in the city of Chester, and terminating at or near a certain place, marked No. 34, in the plan deposited, as in the act of Parliament is mentioned, being at or near Grange-lane, in Birkenhead. It then set out a section of the act, whereby the company were prohibited from making a railway from the station at or near Grange-lane, to or to communicate with Woodside Ferry, until a branch railway should have been made from the main line to Birkenhead and Tranmere Ferries. The declaration then alleged that the defendants wrongfully and fraudulently, and for the purpose of evading the act, opened a railway from the station at Grange-lane to and to communicate with the shore of the Mersey, in the township of Birkenhead, between Woodside Ferry and Birkenhead Ferry, and near Woodside Ferry, and conveyed passengers and merchandise along the same to the said station at Grange-lane, although no branch railway had been made from the main line to Tranmere Ferry, in contempt of the act of Parliament and to the plaintiff's damage of £20,000. On general demurrer—*Held*, that the declaration was bad, as it did not contain any averment that the defendants made a railway to or to communicate with Woodside Ferry, or anything necessarily equivalent to such an averment. But, that if it had contained such an averment, the action might have been sustained without any allegation of special damage, the act prohibited not being one merely affecting the public, but an act obvi-

ously prohibited for the special protection of a particular individual. *Chamberlaine v. The Chester and Birkenhead Railway Company*, 870

(4). *Responsibility of Broker for Non-delivery of Scrip.*

The defendant, who resided some distance from Liverpool, authorised the plaintiff, a broker there, to sell for him twenty railway scrip shares. The plaintiff sold them to C., another broker of Liverpool. The scrip shares were not delivered on the day, and C. bought twenty other scrip shares at the market price, and claimed the difference between the contract and the market price. The plaintiff paid him the difference, and brought an action for money paid to recover this sum. It was proved to be the usage amongst brokers at Liverpool, to be responsible to each other upon these contracts, and there was evidence that the defendant was cognizant of this usage: —*Held*, that the defendant was liable.

Semble, per *Parke, B.*, and *Rolfe, B.*, that the defendant's knowledge of the usage was immaterial. *Bayliffe v. Butterworth*, 425

(5). *Forgery of Scrip Certificate.*

A scrip certificate in a railway company is not an "accountable receipt," nor an "acquittance or receipt," within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10; therefore the forgery of such document is not a felony, but a misdemeanor only. *Clarke v. Newsam*, 131

RATE.

(1). *Where Houses "within a Street" for the purpose of rating.*

By stat. 11 Geo. 3, c. 15, "for better paving High-street, Whitechapel, and removing obstructions and annoyances therein," commissioners appointed under that act were empowered, for defraying the charges and expenses at-

tending the execution of the act, to rate all and every person and persons who do or shall inhabit, hold, occupy, possess, or enjoy any house, shop, warehouse, cellar, vault, or other tenement "within the said street."

The Metropolis Paving Act, 57 Geo. 3, c. 29, s. 24, enacts, that rates for paving or repairing the pavements of the said streets or public places in any parochial or other district, by virtue of any local act, or of the said act, shall be laid "upon all persons who shall inhabit, hold, occupy, be in possession of, or enjoy any messuages, tenements, lands, grounds, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings or hereditaments, situate or being within any of the streets or places within the said parochial or other district."

To the north of High-street, Whitechapel, and communicating with the street by means of a covered gateway, there is a yard called the "Kent and Essex Yard," around which are several dwelling-houses, warehouses, stables, sheds, a booking-office, and other buildings. The yard, (with the exception of the width of the gateway), and all the dwelling-houses, &c., round the same, are situate at the back of several houses and premises which front High-street. The entrance into the yard is through carriage-gates and along a covered gateway. No part of the yard was ever paved or repaired by the commissioners, nor had they, within the yard, at any time exercised any of the powers conferred on them by the above acts.

Held, that the occupiers of the yard and houses therein were liable to be rated in respect of the paving and repairing of High-street, the premises being, for that purpose, "within the street," inasmuch as they had a frontage on the street, and their sole communication was with the street. *Baddeley v. Gingell*, 319

(2). *Validity of Chapel-Rate—when to be questioned.*

A chapel-rate was laid on the landholders of the chapelry only, exclusively of the holders and occupiers of mills and houses:—*Held*, that an occupier of land within the chapelry, who did not object to the rate before the justices when summoned for non-payment, could not question its validity in an action of replevin, after distress on his goods under the justices' warrant.

A chapel-rate, duly made, but objected to from extrinsic circumstances, can only be questioned in the ecclesiastical court.

An order of justices for payment of chapel-rate need not state that the proceedings were taken "on oath."
Ramsbottom v. Duckworth, 506

(3). *Construction of Local Act.*

1. Trespass for breaking and entering plaintiff's mill, and taking his goods. Plea, under 1 Vict. c. 79, (local), that defendants, as commissioners under the act, completed *one* of three reservoirs mentioned therein; that plaintiff's mill was benefited by the supply of water therefrom; that a certain rate was made, and that the trespass was committed and the goods were taken as a distress for nonpayment of the rate. Replication, that only *one* reservoir had been completed. The act was for making and maintaining reservoirs upon the tributary streams of the river Etherow, otherwise the Mersey, in the parish of Glossop, in the county of Derby, for more effectually and regularly supplying with water the mills, manufactories, and works on the said tributary streams and rivers. The preamble of the act recites that certain manufacturing trades were extensively carried on along the tributary streams of the river Etherow, otherwise the Mersey, and along the said river, and that great

inconvenience was felt by persons engaged in those trades from the supply of water being inadequate to propel the machinery of their mills, &c., situated thereon; and that such inconvenience would be greatly removed by the construction of proper reservoirs for creating a regular supply; and that there were three eligible situations for such reservoirs in three narrow valleys in the township of Glossop, Whitfield, Simmondley, and Chunal, in the parish of Glossop, through which the said tributary streams, called &c., run, by which the mills, &c., might be regularly supplied with water; and that it would be of great advantage to the occupiers of the mills, &c., and of the lands adjoining, and to the public, if the object were accomplished. The style of the corporation to be "The Commissioners of the Glossop Reservoirs." By s. 18, the persons qualified to vote at meetings are the occupiers rated, or who would be liable to be rated, if the reservoirs to be made were then actually made and in use. By s. 33, the commissioners are empowered to levy rates yearly, or half yearly, upon all persons who shall occupy any part of the said tributary streams or river Etherow, and the falls, within certain limits, in certain proportions. By s. 34, separate rates are to be levied for each reservoir, and separate accounts to be kept. By s. 39, the commissioners are to appoint persons to survey and ascertain the height of falls, and degree of benefit derived by the said mills, &c. Sect. 38 enacts, that "no rate shall be levied or assessed under the provisions hereinbefore contained until *the said reservoirs* shall be actually made and in use, and water supplied therefrom:"—*Held*, that the completion of *one* reservoir entitled the commissioners to levy a rate on the persons actually benefited by it; and therefore that the plea was good.
Sidebottom v. The Commissioners of the Glossop Reservoirs, 177

2. To an action of trespass for breaking and entering plaintiff's mill and taking his goods, the defendants pleaded a justification under 1 Vict. c. 79, (local), that defendants, as commissioners under the act, completed *one* of three reservoirs mentioned therein; that plaintiff's mill was benefited by the supply of water therefrom; that a certain rate was made, and that the trespass was committed and the goods were taken as a distress for nonpayment of the rate. The plaintiff replied, that only *one* reservoir had been completed. General demurrer. The 38th section enacts, that "no rate shall be levied or assessed under the provisions hereinbefore contained until *the said reservoirs* shall be actually made and in use, and water supplied therefrom:"—*Held*, on error in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer), that, upon the true construction of the act, the completion of *one* reservoir entitled the commissioners to levy a rate on the class of persons mentioned in the act actually benefited by it; and therefore that the plea was good. *Ib.*, (in error), 611

RECEIPT.

See RAILWAY COMPANY, (5).

REPLEVIN.

See RATE, (2).

REPLICATION DE INJURIA.

See PLEADING, IV, (2).

SCHEDULE.

See EVIDENCE, (3).

SCIRE FACIAS.

See PLEADING, I, (13).
PRACTICE, (9).

Form of Writ on Judgment against Public Officer of Banking Copartnership.

The Court quashed a writ of sci.

fa. on a judgment recovered against the public officer of a banking copartnership, which alleged that the defendant was a member "at the time of the commencement of the action in which the judgment was obtained, and at the time of the recovery and giving of the judgment, and from thence continually has been and still is a member." *Bank of Scotland v. Fenwick*, 792

SCOTCH SEQUESTRATION ACT.

Warrant of Protection.

A renewed warrant of protection from imprisonment under the Scotch Sequestration Act, 2 & 3 Vict. c. 41, may be signed either by the sheriff or sheriff-substitute. *Jones v. Anstruther*, 867

SEDUCTION.

When Action not maintainable.

An action for seduction cannot be maintained without some proof of loss of service thereby; therefore, where it appeared that the defendant had debauched the plaintiff's daughter, and that she was delivered of a child, but the jury found that the child was not the defendant's:—*Held*, that the jury were rightly directed to find a verdict for the defendant. *Eager v. Grimwood*, 61

SET OFF.

See PLEADING, III, (7).

SETTING ASIDE PROCEEDINGS.

See ATTORNEY, (1).

SHERIFF.

See EVIDENCE, (2).
PLEADING, I, (8).

Right of, to detain Prisoner after Receipt of Order for Discharge.

The defendant who was in custody

at Cambridge, received an order on a Saturday for his discharge: this was forwarded to the under-sheriff at Wisbeach. On the next day, *Sunday*, the gaoler received a warrant of detainer under a writ of ca. sa., which had been issued the day before:—*Held*, that the sheriff was entitled to detain the defendant for a reasonable time after the receipt of the order, for the purpose of searching his office for writs, and that the defendant was not entitled to his discharge under 29 Car. 2, c. 27, s. 6, on the ground that the service of the warrant on Sunday was void. *Samuel v. Buller*, 439

SLANDER.

(1). *Words spoken of a Surgeon.*

A declaration stated that the plaintiff was a surgeon and accoucheur, and in that character had attended one R. during her confinement; that the defendant, in a discourse which he had with R., of and concerning the plaintiff, and of and concerning the plaintiff in relation to his said profession and business, spoke of and concerning &c., the following words:—"I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he is a bad character; none of the medical men here will meet him. There have been many inquests had upon persons who have died because he attended them." The defendant pleaded not guilty. At the trial the latter words, as to the inquests, were not proved, but the words proved were, "several have died that the plaintiff had attended, and there have been inquests held on them." The judge amended the declaration accordingly, and a verdict was found for the plaintiff:—*Held*, on motion for a new trial, that the judge was justified in making the amendment; also, that the words as amended were actionable, without the aid of any innuendo

to explain them by reference to extrinsic circumstances.

Semble, that the words, "he is a bad character, none of the medical men here will meet him," alone were actionable, as importing the want of a necessary qualification for a surgeon in the ordinary discharge of his professional duties. *Southee v. Denny*, 196

(2). *Privileged Communication.*

Under statute 5 & 6 Vict. c. 109, the vestry, on precept from the justices, are to make out and return a certain number of persons within the parish qualified and liable to serve as constables; the list is to be affixed on the church door, and notice given when and where objections will be heard by the justices, who are empowered, at a special sessions, to strike out of the list the names of persons not qualified or liable to serve. At a vestry held in pursuance of that act, the plaintiff's name was inserted in the list of persons qualified and liable to serve, and he attended a session for the purpose of being sworn in, when the defendant, a parishioner, objected to him, and made a statement to the justices, in the presence of other persons, imputing perjury to the plaintiff. In an action for slander the jury found that the defendant made the statement *bonâ fide*, believing it to be true:—*Held*, that the statement was properly made before the justices, and was a privileged communication. *Kershaw v. Bailey*, 743

SMALL DEBTS ACT.

(1). *Meaning of Term "Cause of Action."*

The 63rd section of the Small Debts Act, 9 & 10 Vict. c. 95, enacts, "that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or

more suits in any of the said courts :”—*Held*, that the term “cause of action” meant “*cause of one action*,” and was not limited to an action on one separate contract.

In the case of tradesmen’s bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one entire demand, such demand, if it exceeds £20, ceases to be within the jurisdiction of the county court.

Therefore, where the sub-contractor of a railway company gave his workmen tickets or orders for goods, which were supplied by the plaintiff, and the latter brought 228 actions in the county court against the defendant in respect thereof for sums amounting in the aggregate to 308*l.* 19*s.*, the Court granted a prohibition, though one claim only amounted to £5 and many to less than 20*s.*

Quære, whether the 63rd section of the Small Debts Act applies to all debts which could be comprised in one description in one count?

Quære, whether a prohibition ought to be granted where a cause of action has been improperly divided into several suits, but the aggregate amount claimed does not exceed £20? *In re Aykroyd*, 479

(2). *Title to Corporeal or Incorporeal Hereditaments.*

By a local act of Parliament for rebuilding a certain church, trustees were empowered to levy rates upon all houses in the parish, one-half to be paid by the landlord, and the other half by the tenant; the tenants to pay the whole rate in the first instance, and to deduct a moiety out of the rent; and that every landlord should allow of such deduction accordingly, *notwithstanding any agreement to the*

contrary. After the passing of this act, a lease was granted in the parish to a tenant, who covenanted to pay all parliamentary and other taxes and rates. The tenant paid the full rent and the rate, but the landlord refused to deduct a moiety of it from the plaintiff, on the ground that the act only applied to agreements in existence at the time it was passed. The tenant having sued the landlord in a county court for a moiety of the amount so paid for rates:—*Held*, that, as no question was raised as to “the title to any corporeal or incorporeal hereditaments,” within the 58th section of the stat. 9 & 10 Vict. c. 95, there was no ground for a writ of prohibition.

Semble, per *Parke, B.*, that the act applied only to agreements entered into before it came into operation. *In re Knight*, 802

(3). *Action in Superior Court.*

1. The 129th section of the 9 & 10 Vict. c. 95, which deprives of costs parties who sue in the superior courts for causes for which plaints might have been entered in the county court, does not apply to an action commenced in the superior court after the publication of an order in council establishing the county court, but before the appointment of either judge or clerk. *Parker v. Crouch*, 699

2. The 129th section of the 9 & 10 Vict. c. 95, which deprives of costs parties who, after the passing of that act, sue in the superior courts for causes for which a plaint might have been entered in the county court, does not apply to an action commenced in a superior court after the passing of that act, but before the county court was established by order in council. *Harries v. Lawrence*, 697

SPECIAL DAMAGE.

See RAILWAY COMPANY, (3).

SPIRITS.

See EXCISE, (2).

STAMP.

(1). *Letter of Allotment of Shares in Railway Company.*

A. applied by letter for shares in a railway company, and thereby undertook to accept the shares which might be allotted to him, to pay the deposit, and to sign the parliamentary contract and subscribers' agreement. In answer to this he received a letter, allotting to him a certain number of shares, and requiring him to pay the deposit thereon on a certain day, and stating that the committee reserved the power to cancel the allotment, without notice, on nonpayment. In an action by A. to recover the deposit, the scheme having failed—*Held*, that the letter of allotment did not require a stamp. *Vollans v. Fletcher*,

20

(2). *Receipt of Money paid as Deposit.*

An acknowledgment by a banker of the receipt of money paid as deposit by an allottee of shares in a joint-stock company, does not require a stamp. *Clarke v. Chaplin*,

26

STATUTE (LOCAL).

See RATE, (1), (3).

SUITORS' FUND.

See ANNUITY, (2).

SUNDAY.

See SHERIFF.

SURETY.

See BANKRUPTCY, (2).

SURGEON.

See SLANDER, (1).

SURGEON OF COUNTY GAOL.

SURGEON OF COUNTY GAOL.

By 14 Geo. 3, c. 59, s. 1, justices in quarter sessions assembled were authorised and required to appoint a surgeon, at a stated salary, to attend prisoners in gaol. The 4 Geo. 4, c. 64, (which repealed the 14 Geo. 3, c. 59, so far as related to the gaols of certain enumerated cities, not including "Ipswich,") by sect. 33 enacted, that justices in general or quarter sessions assembled should from time to time appoint a surgeon to prisons within their jurisdiction; and it should be lawful for them, after such appointment, to direct a reasonable sum to be paid as salary to each surgeon. The 5 & 6 Will. 4, c. 76, s. 116, enacts that the town council of boroughs enumerated in the 4 Geo. 4, c. 64, shall thenceforth have all the powers which justices in sessions possessed under that act; and sect. 105 enacts, "that the recorder of every borough shall hold quarter sessions of the peace, at which he shall be the sole judge." The 7 Will. 4 & 1 Vict. c. 78, s. 38, enacts, "that all powers of regulation which before the passing of the 5 & 6 Will. 4, c. 76, were possessed by the justices, and all things by any act of Parliament provided to be done at any quarter sessions, in relation to the regulation of any gaol, should be exercised by the borough justices, who should for that purpose hold a quarter sessions, provided that no order of the justices, which should require the expenditure or payment of money, should be of force until confirmed by the council." The 2 & 3 Vict. c. 56, extended the provisions of the 4 Geo. 4, c. 64, to all gaols.

Held, that the effect of the 7 Will. 4 & 1 Vict. c. 78, was to restore to the borough justices the power which they possessed before the 5 & 6 Will. 4, c. 76, of appointing a surgeon, and that the 2 & 3 Vict. c. 56, put all

borough gaols, with reference to the 4 Geo. 4, c. 64, on the same footing with the gaols of the boroughs there enumerated, as if that statute had extended to all boroughs; and therefore that the right of appointing a surgeon for Ipswich gaol was properly exercised by the borough justices. *Hammond v. Peacock*, 41

SWEET SPIRITS OF NITRE.

See EXCISE, (2).

TITHE COMMISSIONERS.

Liability of—Notice of Action—Venue.

Case.—The declaration recited that one T. A., deceased, was owner of certain lands, subject to tithes; that, during his lifetime, an award was made, and confirmed by the tithe commissioners, of the sums to be paid in lieu of tithes; that an apportionment of the rent-charge was made, and all expenses incident thereto were paid without dispute or difference; but that defendants, under colour of their office of Tithe Commissioners, and falsely pretending to act under the authority of the Tithe Commutation Act, wrongfully, wilfully, maliciously, and oppressively intending, by false pretexts, and by a wilful and unjust perversion of the powers of the act, to compel the plaintiff to pay to one F. a sum of money claimed in respect of a certain award, ~~and~~ being expenses incident to the apportionment of the rent-charge in lieu of tithes, and wilfully and maliciously, &c. intending to make the plaintiff pay a certain sum as incident to the expenses of the apportionment, falsely, and without probable cause, made a certificate, by which it was certified, that a certain sum was due from the lands of T. A., deceased, of which plaintiff was then owner, for expenses incident to the

apportionment, touching which a difference had arisen between the plaintiff and F.; the declaration then averred that no difference existed, and that the sum of money was not due; and that all expenses had been paid, all of which the defendants well knew at the time they made the certificate; that afterwards, the defendants delivered the certificate, in order to be produced before two justices, in order to cause the amount mentioned in it to be levied on plaintiff's goods; that the justices granted a warrant on the production of the certificate, and a distress was levied upon plaintiff's goods.

The defendants pleaded, that the alleged grievances were committed after the passing of stat. 6 & 7 Will. 4, c. 71, and 5 & 6 Vict. c. 97, and that the alleged grievances were committed under the authority of the first act, and that no written notice of action had been given one month before action. Verification. Second plea: that the alleged grievances were committed after passing an act in the last plea first mentioned, and were done under the authority of that act, and they were committed in the county of M., and not of D. Verification.

Held, on special demurrer to the pleas, that they were good; and that the action would lie and was proper in form. *Acland v. Buller*, 837

TRESPASS.

See COSTS, (2).

TRESPASSER AB INITIO.

See PLEADING, IV, (1).

TRIAL AT BAR.

Writ of Octo vel Decem Tales.

For defect of jurors on a trial at bar, a rule absolute granted for a writ of octo vel decem tales, *Buron v. Denman*, 769

TROVER.

See PLEADING, I, (12).

TRUSTEE.

See DEVISE, (6).

USAGE OF BROKERS.

See RAILWAY COMPANY, (4).

USE AND OCCUPATION.

See PLEADING, III, (1).

USURY.

See PLEADING, III, (9).

VENDOR OF LAND.

See LIEN.

VERDICT.

Alteration of.

The Court will not permit a party to retain a verdict upon a record which has been improperly altered by him. *Suker v. Neale*, 468

WARRANT OF PROTECTION.

See SCOTCH SEQUESTRATION ACT.

WARRANTY.

See CHARTERPARTY.

WHITECHAPEL PAVING ACT,

11 GEO. 3, c. 15.

See RATE, (1).

WITNESS.

See COSTS, (1).

WRIT OF SUMMONS.

Admissibility of Evidence affecting Credit of.

In an information under the revenue laws, a witness, who had given material evidence as to the fact in issue, was asked, on cross-examination, whether he had not said that the officers of the Crown had offered him a bribe to give that evidence. He denied that he had ever said so:—*Held*, that evidence was inadmissible to show that he had made such a statement.

Quere, as to the extent to which evidence is Admissible, since 6 & 7 Vict. c. 85, for the purpose of affecting the credit of a witness. *Attorney-General v. Hitchcock*, 91

WORK AND LABOUR.

See PLEADING, I, (3).

WRIT OF SUMMONS.

Amendment of.

In an action against two executors, the Court refused, after plea, to amend the writ of summons, by adding the name of another executor, although the Statute of Limitations had run since the commencement of the suit. *Quere*, if the amendment would have been allowed before declaration or plea?

In order to save the Statute of Limitations, the Court will amend writs of summons in all cases where an amendment could have been made under the old process. *Goodchild v. Leadham*, 706

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